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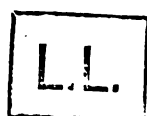
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REPORTS

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OF

CASES IN LAW AND EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF THE STATE OF GEORGIA,

AT

ATLANTA, MARCH TERM; MILLEDGEVILLE AND ATHENS, MAY
TERMS; SAVANNAH, AND PART OF THE DECISIONS
AT MACON, JUNE TERMS, 1858.

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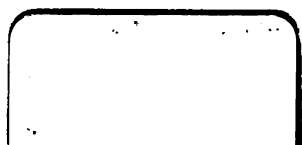
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
MARCH TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

•

**JOSIAH PYRON, surviving executor, plaintiff in error, vs. SA-
RAH C. PARKER, and others, defendants in error.**

A deed of gift of a slave, if made and recorded according to the provisions of the Act of 1838, "to prescribe the mode of making gifts of slaves," is good against subsequent purchasers from the donor.

**Trover, from Spalding county. Tried before Judge CAB-
INNESS, November Term, 1857.**

This was an action of trover brought by Sarah C. Parker, and others, against Josiah Pyron and Lewis Pyron, executors of James Shipp, deceased, for the recovery of a negro woman slave named Caroline.

Lewis Pyron, one of the executors, died pending the suit, and the action proceeded against the survivor.

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Plaintiffs offered and read in evidence a deed of gift from John Parker, their father, whereby he, in consideration of love and affection, conveyed to them one lot of land in Pike county containing 202½ acres, one half lot in the same county containing 101½ acres, and twenty-five acres, part of another lot in same county; also, four negroes, Zill, Till, *Caroline* and Hannah; also, one bay horse, one bay mare, one cart and oxen, fifteen head of cattle, thirty-five head of hogs, and all his stock of provisions, corn, fodder, and all his household and kitchen furniture. He appointed Beverly Pyron agent, to act and do with the property conveyed to his children as he might think best for them. The deed bore date 29th March, 1842, and was recorded in the office of the Clerk of the Superior Court, 26th May, 1842. It was signed and sealed by John Parker, and witnessed by two witnesses, one being a Justice of the Peace.

Plaintiffs then read the answers to interrogatories of *Henry Jones*, who testified, that in the year 1852, James Shipp bought the negro *Caroline* from John Parker and his wife, but does not know whether Shipp ever had her in possession or not. She was worth between four hundred and four hundred and fifty dollars; that Shipp, he thinks, died in the latter part of the year 1853, in Pike county; knows that Shipp, at the time he bought *Caroline*, knew that John Parker had made a deed of gift of said negro to his children, because, before that time, witness and Shipp had stood John Parker's security to Isaac B. Williamson, on a note for about \$400, and Williamson wanted his money, and hearing that Parker had made a deed of gift of his property to his children, witness and Shipp went to Zebulon and examined the Clerk's office, and found the deed on record.

In answer to the cross interrogatories, witness says, that John Parker was indebted, at the time the deed of gift was made, to John Neal and Joseph Scott, but knows of no other indebtedness, and knows of no suits then pending against

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him; that he had no other property not included in the deed of gift, except some little stock; does not know how many children he had; Parker is in a very poor condition; is worth nothing, and is a man of very weak mind, almost no mind at all, and has been in his present condition, as to property and mind, from three to five years; witness has furnished his family with from fifty to seventy-five dollars worth of provision annually for four or five years past, which was paid out of the proceeds of the crops made by the family up to the present year; does not know what went with the money paid for the negro Caroline, but supposes that it went to pay for provisions. At the time Shipp bought the negro, Parker owed him about \$120, and supposes he had been owing it one or two years.

Martha Parker, the wife of John Parker, the donor, in answer to interrogatories, testified, that she was present when Shipp bought Caroline; she was delivered to him the same day he bought her, and he carried her off; and told witness afterwards that he hired Ab. Woods to carry her off and sell her for him; Shipp knew that she had been given to the children before he bought her, because he and her husband had made an effort to break the deed and failed.

To the cross interrogatories, she answered, that she did not know to whom John Parker was indebted at the time of making the deed; he owed Joseph Scott and John Neal, but how much did not know; he may have owed others. John Parker is my husband; we were husband and wife at the time the deed was made. The two first named plaintiffs are my step-children; William R. Dunn is my son-in-law, and the other plaintiffs are my children; I have two children younger than those named as plaintiffs; my youngest son named as plaintiff was born in December, and the deed was made the following May; I think about fifteen years ago. Does not know how much her husband was indebted at the time the deed was made, nor to whom, except to Joseph Scott and John Neal. Never persuaded him, in the presence of

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Robert Murphy and wife, to make the deed to keep the negroes from being taken to pay his debts, and never heard him say he made it for that purpose. James Shipp bought Caroline and employed Ab. Woods to carry her off and sell her; don't know how Shipp paid for her; John Parker had very little property besides that contained in the deed when the deed was made, and that consisted of household and kitchen furniture, with perhaps a small stock of hogs and cattle. Here plaintiffs closed.

Abraham D. Woods, for defendant, testified, that he knew the negro Caroline; was present when she was sold; Shipp did not purchase her, but was present at the sale; he had a debt against Parker, and also against witness; Shipp took up witness' note, and gave his note to Parker for the balance of the purchase money; Shipp did not take possession of the negro, nor did he sell her; he took her up behind him on leaving Parker's, as witness' mare was unruly; delivered her to witness on separating with him; he did not employ witness to sell the negro or to carry her off.

Cross Examination.—Shipp took no bill of sale; the negro was carried off in the summer of 1851. Shipp's debt on Parker, which was paid by witness in the purchase of the negro, was sixty or seventy dollars; witness kept her some two or three months; she stayed at Shipp's until the next day after she was bought; witness sold her to a man by the name of Hornbuckle, in Perry county, Alabama, for over \$500; carried her off in 1851; she was kept after her purchase first at Mark Tidwell's, in Merriwether county, afterwards at Mr. Stamper's, in Alabama; she crossed the State line in 1851; witness lives in Haralson county. Shipp and Parker were brothers-in-law; Shipp did act as Parker's agent; Parker sent word to witness by Shipp, and upon receiving that word, witness went up to Parker's and made the trade with him; Shipp gave Parker his note for the balance of the purchase money due from witness for the negro; witness

had a note on Grier, and proposed to give it to Parker; he refused to take it, but said he would take Shipp's note; let Shipp have Grier's note, and Shipp gave Parker his note; told Parker to send me (witness) word if he accepted my proposition; Shipp brought word that he accepted it, and witness accordingly went.

Defendant then offered to prove by *Joseph Scott*, that at the time the deed of gift was made, John Parker was indebted in an amount about equal to the property he had, and that he was then indebted to John Coggins about one thousand dollars; to Isaac Williams seven hundred dollars; and to said Scott seven hundred dollars; and at the time the deed was made, Shipp was a creditor of Parker. The Court rejected this testimony, and defendant excepted.

The Court charged the jury, that if a debtor make a voluntary conveyance to his children or others, the conveyance is void as to creditors, but good against the grantor and purchasers from him, with notice of the conveyance. And if a creditor purchase from the grantor, with notice of the conveyance, he takes subject to the claim of the grantees in the voluntary conveyance.

Creditors might set aside the conveyance, so far as their debts are concerned, but not by a purchase from the grantor.

The grantor having parted with title to the property, loses all control and dominion over it; and a subsequent sale, to a creditor, with notice, will convey no title; but if a creditor should purchase without notice of the voluntary conveyance, his title will be good, and creditors, who become such after the execution of the voluntary conveyance, with notice, will acquire no title. But purchasers, whether creditors or not, or whether prior or subsequent creditors, purchasing without notice, are protected.

To which charge defendant excepted.

The jury found for the plaintiffs four hundred dollars,

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which might be discharged by the delivery of the negro girl Caroline by the 1st January, next, and the further sum of two hundred dollars for hire, &c.

Defendant moved for a new trial on the grounds,

1st. Because the verdict is against law and evidence, and the weight of the evidence.

2d. Because the Court erred in rejecting the evidence of Joseph Scott.

3d. Because the Court erred in charging the jury that a *creditor*, with notice of a voluntary conveyance, acquired no title by a purchase from the grantor after the making of the deed and notice thereof.

4th. Because of newly discovered evidence since the trial.

The Court refused the motion for a new trial, and defendant excepted.

H. GREEN; and O. C. GIBSON, for plaintiff in error.

HALL; and FLOYD, *contra*.

By the Court.—BENNING, J. delivering the opinion.

John Parker, in 1842, made a deed of gift to his children, of all of his property, which included some negroes. This deed was signed and sealed by him, was attested by two subscribing witnesses, one of whom was a Justice of the Peace, and was regularly recorded within twelve months from its date.

In 1852, he sold one of the negroes, to Shipp or to Wood, to which of the two, the testimony leaves in some doubt.

At the time of this sale, Shipp held a debt of \$120, on Parker, but it was a debt of not more, probably, than one or two years standing; Wood held no debt on Parker.

The Act of 1838, "to prescribe the mode of making gifts of slaves," is, in its first section, as follows: "*Be it enacted*,

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That no gift of any slave, or slaves, hereafter to be made, shall be good or available in law, or in equity, against the creditors of the donor, or subsequent purchasers from him, without actual notice, unless the same be made in writing, signed and sealed by the donor, attested by at least one subscribing witness, and shall be proved or acknowledged, and be recorded within twelve calendar months from the execution thereof." *Cobb Dig.* 176.

This is as much as to say too, by implication, that if such deed be "made in writing, signed and sealed by the donor," &c., it shall be good and available "against the creditors of the donor, or subsequent purchasers from him," even though they be "without actual notice."

In that case, whether it was Shipp, or Wood, that was the purchaser, he was a purchaser subsequent to the deed of gift; and if it was Shipp, he was also a purchaser with actual notice of that deed. And Shipp, considered as a creditor, was also a creditor subsequent to the deed.

It follows, that the deed of gift was good and available against Shipp, or Wood, whichever it was, that was the purchaser.

It must also follow, that the rejection of Scott's testimony, was right, and, that none of the charges of the Court was such, that the plaintiff in error, could complain of it.

The newly discovered evidence, could have served no purpose, except to impeach Mrs. Parker, if that; but if her entire testimony were rejected, the verdict ought still to stand—the other evidence, and the statute aforesaid, considered.

Judgment affirmed.

GREEN B. DOSTER, plaintiff in error, vs. **JAMES BROWN**, defendant in error.

- [1.] Books kept by the party himself, having no clerk, with alterations and erasures of amounts, are not admissible in evidence.
- [2.] A witness who has been the owner of mills for 25 or 30 years, may be admitted to give his opinion as to the capacity of a person as a millwright, judging from the fact that his work did not answer the purpose intended.
- [3.] It is not error for the Court to arrest the argument of counsel on a point to which there is no evidence.
- [4.] It is a good defence in an action for the price of work done under a special contract, that the work was unfaithfully done, whether there was an express warranty or not.

Assumpsit and New Trial, from Coweta county. Decided by Judge **BULL**, September Term, 1857.

This was an action by **Green B. Doster** against **James Brown**, to recover the amount which the plaintiff claimed for work done in the erection of a mill for the defendant. The dam of the mill was washed away and the defendant refused to pay the plaintiff the amount claimed.

On the trial the plaintiff introduced a memorandum book to prove the account. To the admission of this in evidence the counsel for the defendant objected on the ground that it was without date and that there were alterations and erasures in the amounts charged, and the Court ruled it out.

The facts of this case are sufficiently stated in the opinion of the Court.

POWELL, for plaintiff in error.

SIMS and **ERSKINE**, *contra*.

By the Court.—**McDONALD**, J. delivering the opinion.

[1.] The first assignment of error in this record is on the decision of the Court rejecting, as evidence, the memorandum book of the plaintiff, tendered as his book of original entries, to prove the account sued on. It was ruled out on two

grounds. 1st. Because it was without date; and secondly, because it showed, upon inspection, manifest alterations and erasures in the amounts charged. The date of the account may have been proved by other evidence, and that the book had no date, was not a valid objection to its being admitted in evidence. The date of the account must have been proven, however, in some way. The other reason for excluding the books is a sound one. This kind of evidence is of the lowest grade, being the mere declarations of the party himself, in writing, that another is his debtor. There can be no reliance on such a book, where the amounts have been altered, and there are erasures, and there is no explanation, and the party had no clerk and made the entries and alterations himself. They ought to have been rejected.

[2.] The only objection made to the admissibility of the evidence of Samuel D. Echols, was that he was not an expert. There was no question asked him as to the particular work done. He testified that the plaintiff was no millwright, and that his opinion was founded on work done by him for both the witness and the defendant. He had owned mills twenty-five or thirty years, and had work done on them. In the case of *Malton vs. Nesbit and another*, 1 *Car. & P.* 70, which was an action for negligently steering a ship, whereby she was wrecked, nautical men were called and allowed to give their opinion, whether upon the facts in proof there was negligence. They were not steersmen. I see no reason why a mill owner of twenty-five or thirty years experience may not give his opinion in a case like this. An expert is nothing more than a man of experience in the particular business to which the enquiry relates.

[3.] The Court below committed no error in arresting the argument of plaintiff's counsel, that he was entitled to recover the amount contracted to be paid to him, although the work was not done, if he was prevented by the act of God from finishing it. There is no such principle. He might, in such case, be entitled, on a *quantum meruit* count, to recover

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for what materials had been furnished and the work which he had done, if it was worth anything. But in this case there was no evidence to support the argument. The mill and the dam had been washed away. There was no extraordinary flood, and one of the witnesses testified that the rain was not very heavy. The mill was not braced, nor was the dam or mill house weighted down. There was nothing to prevent its floating off. If the evidence be true, instead of what is termed in law, the act of God, preventing the work, the destruction of the mill and dam was the result of the great unskillfulness or the gross negligence of the plaintiff in executing the work which he had undertaken. While every shower of rain that falls upon the earth is the act of God, in contradistinction to the act of man, yet an ordinary freshet is not the act of God, in the legal sense which protects a man against responsibility for the non-performance of a contract like that made by this plaintiff. If by skill and labor, the work can be done by man so as to resist the ordinary, or what may be called extraordinary floods, which often occur, but at long intervals, and the work is carried away, it cannot be attributed to the act of God ; but if what is called a water spout, descends with such overwhelming power and force as to bear off every thing before it, and is irresistible, and the strongest work of man cannot stand up against it, then it may be said that man is faultless in the matter, and therefore excused for failure by the law. But such extraordinary and resistless calamities enure as an excuse and relief of both parties. If it legally releases the one from executing a work he has undertaken, it equally protects the other from paying for more than has been done.

In this case there was no proof of the value of the work done. The party relied on a special contract and sued for a stipulated price.

[4.] There was an objection to the admission of proof of the washing away of the mill and dam unless there had been a warranty of the work. There was no strength in this ob-

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jection.' The party was bound to do faithful work, for that is implied in every contract, whether there was a warranty or not. We have discussed and disposed of most of the grounds taken in the motion for a new trial. We think that the verdict is fully sustained by the evidence, and that there was no error committed by the presiding Judge against the plaintiff in his charge to the jury and that he committed no error in refusing the new trial.

Judgment affirmed.

THEOPHILUS PEARCE, plaintiff in error, vs. LUCINDA VAUGHN,
defendant in error.

Where the evidence is balanced, a judgment refusing a new trial, will not be disturbed.

Covenant, from Spalding county. Tried before Judge
CABINISS, at November Term, 1857.

This was an action of covenant, by Theophilus Pearce against Lucinda Vaughn, for the recovery of damages for the breach of the warranty of soundness of a negro woman slave named Lucy, sold by defendant to plaintiff.

The jury found for the defendant, and counsel for plaintiff moved for a new trial, upon the ground that the verdict was contrary to the evidence, and decidedly and strongly against the weight of evidence.

In the argument before the jury, plaintiff's counsel contended, that inasmuch as the negro had been tendered back, it amounted to a rescission of the contract, and defendant was liable for the maintenance and support of the slave, she being worthless.

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His Honor failed to charge upon this point, not being requested to do so, and for this omission plaintiff excepted.

The presiding Judge overruled the motion for a new trial, and plaintiff excepted.

NORTON, for plaintiff in error.

OGLESBY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

There was evidence on both sides; and that on the one side, about balanced that on the other. When this is so, there can be no reason for disturbing a judgment refusing a new trial. This Court, then, ought not to disturb the judgment of the Court below.

The verdict having been for the defendant generally, the point as to whether the plaintiff, if entitled to recover at all, was entitled to recover for the maintenance of the negro, became of no practical importance.

Judgment affirmed.

JOHN REID, plaintiff in error, vs. JOHN BUTT, adm'r, defendant in error.

[1.] To entitle an administrator to maintain trover against the vendee of his intestate's son and heir at law, it is not necessary to show an order of the Ordinary authorizing a sale of the slaves.

[2.] Where an unmarried son lives with his father, the presumption is that the property on the place belongs to the father. If the father lives with the son, the presumption is the other way.

[3.] Possession of property is *prima facie* evidence of title; and where the possession is joint, the presumption is in favor of the party who exercises principally, if not exclusively, acts of individual control and dominion over the property.

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[4.] Where it turns out, upon the trial of a cause, that a paper purporting to be a deed of gift to certain slaves not specified, has been in existence and destroyed by the donor, no advantage can be taken of the instrument; nor can any presumptions be made to the prejudice of the party making it, unless it be first made to appear that the paper had been executed and delivered; and that the negroes in dispute were included in it.

[5.] A purchases of B a slave; C, the father of B, dies, and D, the administrator of C, brings an action of trover against A to recover the negro, alleging that it was in the possession of his intestate at the time of his death, and he was the owner thereof.

Held, That the plaintiff was entitled to recover the whole property, *aliter*, if the defendant had made proof that there were no debts due by the estate; in that case the plaintiff could only recover the interest or share of the other distributee or distributees of the estate in the property.

Trover, from Union county. Tried before Judge Rice, at November Term, 1857.

This was an action of trover by John Butt, administrator of Robert C. Laughter, deceased, against John Reid, to recover a negro man named Cyrus, alleged to belong to the estate of his intestate.

The defendant set up and claimed title to the negro under a purchase from Robert Laughter, a son of plaintiff's intestate. The father and son lived together, and the testimony was somewhat conflicting as to the ownership and control of the negroes on the place. But as the exceptions go to the rulings and charge of the Court only, it is unnecessary to detail the evidence.

After the testimony was closed, defendant moved for a nonsuit, which the Court refused, holding that an administrator could maintain an action for property which belonged to his intestate at the time of his death, from one claiming under an heir at law, without showing an order of sale from the proper Court. To which decision defendant excepted.

The Judge charged the jury that where a son lives with his father, the presumption is that all the property on the place belongs to the father, and if the property is the son's it

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devolves upon him, or those claiming under him, to prove it. But if the father lives with the son, then the presumption is otherwise and the *onus* changed.

The Court further charged the jury that the possession of property was *prima facie* evidence of title, and if it was proved that the negro in controversy was in possession of plaintiff's intestate in his lifetime and at the time of his death, that was *prima facie* evidence of title to the same. And if it was proven that he hired him out, that was higher evidence of title; and if he received the price of the hire, that was still higher evidence.

After stating to the jury that defendant relied upon a deed of gift, which had been destroyed, the Court charged the jury, that to render that deed available it was incumbent on defendant to prove its contents, who made it, what property was therein conveyed, and that it was duly executed, and that Cyrus passed by said deed to Robert Laughter the son. And further, that if the father, after making the deed of gift, retained possession of it, and never delivered the same, he had a right to destroy it; for without delivery it was of no effect. And if the deed was made by one having no title to the property, then no title could thereby pass.

The Court further charged, at the request of defendant's counsel, that if the negro came into the family by a deed of gift to the son, then they should find for the defendant, whether the donor owned the property or not. That if the father disclaimed ownership of the negro, and he and his son had a joint possession, that disclaimer may be considered as evidence of title in the son. That there may be cases where the father lives with his son, and if they should be of opinion that this is one of the cases, then the presumption that the property belongs to the father does not arise. To all of which charge defendant excepted.

The jury found for the plaintiff \$1200, which might be dis-

charged by delivering up the negro in ten days, and further, \$739 20 for hire.

Whereupon defendant tenders his bill of exceptions and alleges as error the rulings and charges above excepted to.

WM. MARTIN, for plaintiff in error.

PHILLIPS, MILNER, CHISOLM, & WOFFORD, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Should a nonsuit have been awarded in this case? We hold not; neither upon the ground that the plaintiff showed no order of sale from the Court of Ordinary, nor on account of the insufficiency of the proof.

Suppose it be true that the boy Cyrus was sold by the son in the lifetime of the father, although there is positive and unequivocal proof that he was in the possession of the father at the time of his death, still there is testimony enough in support of the father's *title* to carry the case to the jury.

[2.] The next objection is to the charge of the Court as to the presumptions which arise from the possession of property where the father and son live together. After scanning carefully this portion of the charge of the Court, we see no error requiring correction. And further, we think that the proof in the case warranted the charge upon this point.

[3.] The Court charged, amongst other things, that "the possession of personal property was *prima facie* evidence of title; that hiring out the property was still higher evidence of title in the hirer; and that if he received the pay as his own, it was higher evidence still of title in the hirer."

Perhaps as an abstract proposition, or one as applicable to parties generally, who are litigating respecting personal property, this charge would be obnoxious to the criticism made upon it by defendant's counsel, and could hardly be sustained. But understanding it as we do, and as made in reference to the facts of the case, we are inclined to think it was right.

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Here the dispute is between father and son, as to the ownership of a family of negroes; or to speak more accurately, between the administrator of the father and the purchaser under the son. The father, in his lifetime, and son lived together; no paper title is shown in either. The son came out first to this State; rented a piece of land, and then the father followed, accompanied by these slaves. The family consisted of father, this son and a daughter. The question of title is mainly dependent upon the question of possession. And the presumption is in favor of one or the other, according to the preponderance of individual acts of control and dominion exercised by each. In view of this state of things the Court instructed the jury, that possession is *prima facie* evidence of title; and in determining the question of possession, if the father hired out the slaves, the presumption is strengthened that he owned the negroes; if he received pay for them as his own, this is higher evidence still that he, and not the son, owned the slaves.

[4.] It is insisted that all this should count for nothing, inasmuch as it does not appear that the son had notice of this hiring. The jury were not only authorized to infer that the son had notice, but they could not believe otherwise. In 1846 and 1847, two of the negroes, Cyrus, the boy in controversy, and Harriett, a girl, were hired by the father to the witness, Curtis. The old man took the negroes to the witness and brought them away, when the term of service had expired. He paid the wages monthly to the father. Another witness hired another one of these negroes from the old man, for one year, and returned the slave before the old man died. Another witness hired another one of these negroes six or eight months in the year 1849. Living together as they did, it is impossible for the son not to have known of these oft-repeated and long continued contracts of hiring. He was never heard to complain. And the Court, in substance, charged, and so we think, that mere acts of ownership, under the circumstances, indicated pretty strongly that

notwithstanding the joint possession, the title was in the father; especially when it is remembered that no such act of dominion was ever exercised by the son. The acts and declarations of the father, that these slaves were the property of the son, were negative in their character; and likely grew out of the deed of gift which the father at one time made to the son, but subsequently destroyed. But here were distinctive acts of individual ownership on the part of the father, necessarily known to, and for aught that appears to the contrary, acquiesced in by the son. Certainly in this view of the charge we are clear; it was proper, under the peculiar facts of this case.

[4.] Was there error in the Court in its instructions respecting the deed of gift?

It appears from the testimony that a paper was carefully deposited in a cheese box, and locked up in the trunk of the father, which he called a deed of gift to Robert, his son; complaining to his near neighbor, Mr. Farmer, that his son had not treated him well, he directed him where to find the paper, and it was deliberately burnt in the presence of the witness; the father remarking at the time: "This is an end of that. Bob shall not have my property."

It is complained that the Court erred in holding that so far as the title depended upon this paper, it must appear that it was duly executed, and that the negro in dispute passed by it. Whereas, counsel contend that the paper having been destroyed by the father, every presumption is to be made against him as the spoliator of the title. But this argument assumes that this instrument was a title. That it had been duly executed and delivered. If it had always remained in the possession of the father, it was a nullity, and he had a right to destroy it. For myself I am fully persuaded that it never was delivered. I infer this not only from the careful custody and concealment of it by the father, but if it ever had been delivered the son knew it, of course, he being the

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donee in the deed ; and yet he never attempts to procure the benefit of this important document by giving notice to produce it, establishing it as a lost paper, or proving its destruction and contents. Had he known of the existence of this deed of gift; would he not have taken some steps to make it available, seeing that it would have settled forever this controversy ? He says, through his counsel, that he never heard of its destruction until it came out on the trial. If he knew of its existence and not of its loss, how much more probable that he would have taken measures to obtain it.

The truth is, he knew nothing of it, it not having been delivered. And yet all this disclosure shows that the father thought the property his, and that a conveyance from him was necessary to pass the title to his son. And it is a key to all the declarations he made, that these negroes belonged to his son. During the existence of this paper he so spoke of them. And if they did not pass by this inchoate deed, when and how did the son acquire the title ?

[5.] Passing over several minor matters, which amount to nothing, counsel for the plaintiff in error argue that the administrator can only recover one half of the property; and that as heir at law, the son's title to Reid to the other half is good. Had the defendant gone into equity and shown that the son, under whom he claimed, was the only heir, and that there were no debts, he might have been entitled to a perpetual injunction against the action of trover. Or if it turned out that Mrs. England, the sister of Robert C. Laughter, was living, or if dead before her father, left children, or since, a husband, then if there were no debts, the recovery would have been restricted to one half the property. Perhaps the same proof might have been made at law, attended with the same results. But no such evidence was submitted. For any thing that appeared to the contrary, the administrator was entitled to recover the whole property, or its equivalent in value.

Upon the whole, the justice of the case is with the defend-

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ant in error, and for aught that appears in the record to the contrary, the law of the case has been properly administered.

Judgment affirmed.

JOHN M. JACKSON, plaintiff in error, vs. **JAMES A. PAXSON**,
adm'r, defendant in error.

Two parties agree that one of them should furnish the materials and the other should make two buggies, and one of the parties should fix the price and then either might sell; the death of one of the parties does not affect the power of the other to sell the buggies.

Trover and new trial, from Whitfield county. Decided by Judge Trippe, October term, 1857.

This was action of trover brought by James A. Paxson, as administrator of William A. Monday, deceased, against John M. Jackson, to recover two buggies. It was claimed that the buggies belonged to Monday at the time of his death. The defendant purchased them from Bloodsworth. Evidence was produced at the trial, by the defendant, that there was a contract between Monday and Bloodsworth to the effect that Monday was to furnish the material and Bloodsworth was to make the buggies, and when finished, Bloodsworth was to fix the price of the buggies and either of the parties was to sell them and the proceeds were to be divided equally between them. That Jackson furnished the iron to iron off the buggies, and that he purchased them from Bloodsworth—the amount due to him for the iron being deducted out of the price.

It was proved on the part of the plaintiff that the buggies

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were in the workshop of Monday at the time of his death, and that they were removed by Bloodsworth.

The Court charged the jury that if they should find from the testimony that the contract between Monday and Bloodsworth was, that Monday was to furnish the materials and Bloodsworth make the buggies, and that Bloodsworth was to have one-half of what the buggies sold for as pay for his labor, that this would not make them partners, and in that event, they must find for the plaintiff; that to constitute them partners, the contract must have been to share the profits and loss of the business. And if they should find from the testimony that the contract was to share the profits and loss of the undertaking, this would constitute them partners, and this would authorize Bloodsworth to sell the buggies, and in this state of facts, if they should believe Jackson purchased the buggies from Bloodsworth the jury must find for the defendant.

The jury found for the plaintiff, and the defendant moved for a new trial on the following grounds:

1st. Because said verdict is contrary to law.

2d. Because said verdict is contrary to evidence, and strongly and decidedly against the weight of evidence.

3d. Because the Court erred in the charge to the jury, (above set out.)

This motion for a new trial was overruled by the Court, and the defendant filed his bill of exceptions, assigning as error the charge of the Court to the jury, and the refusal to grant a new trial.

WALKER appeared for the plaintiff in error.

JONES & MOORE for the defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

We think that the presiding Judge in the Court below err-

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ed in charging the jury, that, if they should find from the testimony, that, by the contract between Monday and Bloodsworth, Monday was to furnish the materials, and Bloodsworth was to make the buggies, and that Bloodsworth was to have one-half of what the buggies sold for as pay for his labor, this would not make them partners, *and in that event they must find for the plaintiff.*

The Court ought to have charged the jury that if the contract was as testified to by Cox, and they should find that Monday and Bloodsworth were part owners of the buggies, and that, by special agreement, Bloodsworth had a right to put a price on the buggies, when they were done, and either party might then sell them, in that case, the sale made by Bloodsworth was good, and the verdict should be for the defendant. *Collier on partnership*, §1217.

If Bloodsworth had an interest in the buggies, and had power to sell by special agreement, the death of Monday could not affect his authority to sell.

Judgment reversed.

GEORGE W. HUMPHRIES, plaintiff in error, vs. **MCWHORTER & BRIGHTWELL**, defendants in error.

An endorser sued in the same suit with the maker of a promissory note, and residing in a different county, may waive the issuing of a second original and process, and his waiver will bind him.

Affidavit of illegality, from Cass county. Decided by Judge TRIPPE, September Term, 1857.

An action was brought in the Court below by the firm of McWhorter & Brightwell, against Charles H. Hamilton of Cass county, as maker, and George W. Humphries, and Lloyd

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& Pulliam, of Fulton county, as endorsers, to recover the amount of two promissory notes. In that action the jury returned a verdict for the plaintiff, and a *fi fa.* issued upon that Judgment, which was levied on the property of Humphries. To the *fi. fa.* Humphries made an affidavit of illegality, swearing that he was advised and believed that the *fi. fa.* was proceeding against him illegally the judgment issued upon it being void as against him.

After argument, this affidavit of illegality was dismissed by the Court.

Counsel for Humphries then moved for and obtained a *rule nisi* to set aside the judgment rendered against him in the said action, on the following grounds:

1st. Because there was never issued against this movant any second original petition or process for Fulton county.

2d. Because this movant was never served with any copy process or copy petition.

3d. Because this movant never waived the issuing of any second original petition or its process against him, and never waived the service of any copy.

To this rule the respondent answered that the original declaration for Cass Superior Court was filed, to which process was duly attached and service had upon the maker, and that the following acknowledgment was made and endorsed upon the original petition and writ.

“Georgia, Fulton county,

We hereby acknowledge due and legal service of this writ, and waive copy and copy process, and all other service by the sheriff, August 6th, 1856. [signed]

Jas. Lloyd, A. C. Pulliam and G. W. Humphries.”

After argument the Court discharging the *rule nisi*, and refused to make it absolute.

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Counsel for defendant then filed his bill of exceptions, saying that the Court erred,

1st. In dismissing said affidavit of illegality.

2d. In discharging said *rule nisi*, and in refusing to make said rule absolute.

OVERBY, BLECKLY, and HILL, for plaintiff in error.

HAYGOOD, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

Although it appears that error is assigned on the decision of the Court on the affidavit of illegality, it is not insisted on in this Court. The argument, here, was confined to the judgment of the Court below on the motion to set aside the judgment.

We think that the acknowledgement of service by the defendants, alleged in the declaration to reside in Fulton was sufficient to give the Court of Cass county jurisdiction as to them. The entire object of requiring a second original and process to issue when an endorser is sued, and resides in a county different from that of the maker of a promissory note, where the suit must be brought, is to assure the Court that the party has been served, by the proper officer, and that the party himself has legal notice of the suit. This object is fully accomplished by the acknowledgement of service by the parties in this case. The defendant was at liberty to waive a constitutional as well as a legal right in a matter of this sort. He did waive it, and must be bound by it.

Judgment affirmed.

Stancell vs. Pryor.

RIAL STANCELL, plaintiff in error, vs. **WILLIAM PRYOR**, defendant in error.

Words not actionable of themselves may be made so by averment and proof of a colloquium and innuendoes.

Slander, from Walker county. Tried before Judge **TRIPPE**, at November Term, 1857.

This was action of slander by Rial Stancell against William Pryor, for words spoken, &c.

The words alleged to have been spoken, as laid in the declaration, were, "Rial Stancell stole my steel trap—nobody else knew where it was." ●

Columbus F. Roberts, the only witness examined on the part of the plaintiff, testified, that late in the fall of 1854, he called at defendant's house on business; defendant told witness that he had lost his steel-trap; witness asked him if he suspected any person of taking it; he replied, "Yes, Rial Stancell is the only person who knew where it was; I told him where it was the other evening as we came from Brook's sale, and I have missed it from the place since I told Stancell where it was." The witness further testified that about six months afterwards, he and defendant exchanged a few words upon the subject, but the words he has forgotten, but recollects the impression left upon his mind was, that defendant was still charging plaintiff with having taken the steel-trap. That both conversations were commenced by defendant; the first conversation, at defendant's house, was before the bringing of this suit, but he thinks the second was afterwards: does not remember the words used on the last occasion, but recollects that they left him under the impression that plaintiff had taken the steel-trap.

This is the substance of this witness' testimony. Plaintiff then closed.

Defendant moved for a nonsuit,

1st. Because the words as laid in the declaration, had not been proven.

2d. Because the words proven are not actionable.

The Court sustained the motion on the second ground.

Plaintiff moved to continue the case, to enable him to prove, by the next Term of the Court, the words spoken, he having acted upon the belief that the testimony of Roberts (which was by commission) would carry the case to the jury. He further proposed to let the case go to the jury and let them determine the motives which influenced defendant in speaking the words as proven. Both of which motions the Court refused, and ordered a nonsuit, and plaintiff excepted.

ALEXANDER, STANCELL & CROOK, for plaintiff in error.

BLACK, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The declaration in this case might have been amended by alleging a colloquium, that the defendant's steel-trap had been stolen, with suitable averments, that the words were spoken of and concerning the plaintiff, in reference thereto; and on proof of the said allegations with the words, the action might have been sustained. The Court below held that if the words as proven had been actionable, the declaration might have been amended, but we understood the decision to be, that the declaration could not have been so amended as to have sustained an action upon the words: words in themselves not actionable may be made so by averring a colloquium with suitable averments to apply the speaking to the subject.

Judgment reversed.

Strickland, adm'r, vs. Dent.

JAMES H. STRICKLAND, adm'r, &c., plaintiff in error, vs. JOSEPH E. DENT, defendant in error.

- [1.] A person who sells land, receives notes for the purchase money, and gives a bond to make a title when the money is paid ; on the death of the purchaser insolvent, is entitled to have the land sold and the proceeds applied to the payment of his debt, and the excess alone can be claimed by the creditors.
- [2.] The vendor, in such case, cannot claim a ratable proportion of his debt estimated at the full amount, from the general assets of the estate, and then claim the land, as not having been paid for. The debt of which he has a right to claim a ratable payment, is the balance remaining after crediting the amount for which the land may have been sold.

Equity, from Heard county. Decided by Judge HAMMOND, August Term, 1857.

This bill was filed by James H. Strickland, as administrator of Solomon T. Strickland, deceased, against Joseph E. Dent. The bill states that the intestate contracted with the defendant, Joseph E. Dent, for the purchase of a house and lots in the town of Franklin, for \$1,000, and took the defendant Dent's bond for titles. That his intestate gave Dent two promissory notes in payment for said house and lots, one of said notes payable 25th day of December, 1855, and the other the 25th day of December, 1856, and that action had been brought on the notes. That the intestate, Solomon T. Strickland, died insolvent, on the 11th of October, 1855, out of the State of Georgia, and that complainant was duly appointed his administrator, and returned an inventory of the property of the deceased to the Court of Ordinary, except certain property specified. That the complainant held the bond of Dent for title to the house and lots; that no part of the purchase money for the same had been paid, and that the estate of the intestate was insufficient to pay to Dent the whole amount of his notes for the purchase money, and other debts of equal dignity, and that Dent refused to make titles to the house and lots until the whole of the purchase money had been paid. That complainant had collected all the debts

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of the intestate, with certain exceptions set out in the bill; that many creditors of the intestate had given to complainant statements of debts and claims; and that some creditors of the deceased, to-wit: Smith & Wood, Rollins & Hall, T. M. Jones, and McMillan & Harvey, had obtained judgments in attachment against the property of the intestate, in the Justices Court of the 788th district, in said county of Heard, after the death of the deceased, and before any administration was taken out on his estate. That certain other creditors had brought their actions against the intestate's estate, which were then pending; that in consequence of the great number of the debts, and the inability of complainant to determine, (without discovery from the creditors,) how to rank such debts, complainant could not safely pay the debts without the direction of a Court of Equity. That the said defendant Dent insisted that the two notes given him by intestate, in payment of the house and lots, should be paid equally with the other notes due from the estate. Complainant, therefore, prayed that the creditors of the intestate might be decreed to make a discovery of their claims; that the contract between the intestate and the defendant Dent might be rescinded, and Dent ordered to deliver up to complainant the notes for the purchase money for the said house and lots, and that the complainant might be ordered to deliver up the bond for titles to the same to the said defendant, or that the said house and lots might be decreed to be sold, and the proceeds of the sale of the same paid out to the creditors of the deceased, according to equity and justice, and the decree of the Court; that complainant might, by the decree of the Court, be directed and advised how to pay out the assets of the estate; and that a writ of injunction might issue, restraining creditors who have commenced their suits against complainant, as administrator, from further prosecution of the same, and those creditors who had not commenced suits on their claims, from doing the same, till the final hearing of the cause. There is a prayer for general relief.

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To all of this bill the defendant, Joseph E. Dent, filed a demurrer, except to so much as appertained to marshaling assets, and to a sale of the house and lots by said defendant to complainant's intestate, and the relief prayed therein on the ground that there was no equity in complainant's bill to authorize the particular relief prayed for against said defendant, or any other relief except marshaling assets.

After argument, the Court sustained the demurrer, and dismissed for want of equity so much of complainant's bill as related to the restraint of Joseph E. Dent from proceeding to judgment on said notes.

Counsel for complainant excepted to this decision.

OLIVER, for plaintiff in error.

BUCHANAN & W., *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] There can be no question, that according to the facts alleged in this bill, there is not the slightest ground for the rescission of the contract of the sale of the house and lots by the defendant, Dent, to the complainant's intestate, at the instance of the complainant. Nor is there any equity in the prayer asking a decree of the sale of the property, and the application of the proceeds of the sale to the payment of the debts of the intestate, and to allow Dent to come in *pari passu* only, with the other creditors of the deceased. The title cannot pass from Dent until the purchase money is paid, except under such decree as a Court of Chancery ought to make in the premises.

[2.] But there are allegations in the bill which entitle the complainant to an injunction against the prosecution of the suits of Dent on the notes. The bill alleges that Dent insists

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that the said notes due to him shall be paid equally with other notes due from the estate, and he be allowed to hold the title to the said house and lots. There is a prayer in this bill that the Court would decree a sale of the house and lots, and that the proceeds be paid out to the creditors of the deceased, according to equity and justice, and the decree of the Court, as well as a prayer for general relief. It is competent for the Court, under the allegations and prayers of this bill, to decree a sale of the house and lots; that the purchaser shall pay the purchase money to the said Dent, to an amount sufficient, if the property should sell for so much, to pay the principal and interest of his debt, and that Dent shall thereupon execute a title to the purchaser; and that the complainant be decreed to deliver up, thereupon, to Dent, his bond to make titles; and further, that if the house and lots should not sell for enough to pay the said notes, that Dent shall receive the money for which they were sold, and execute a title to the purchaser, and come in *pari passu* with other creditors having demands of the same dignity, for whatever balance may remain due on the said notes, after crediting the proceeds of the sale of the house and lots. The defendant, Dent, has no right to carry his debts into judgment and come in and claim against the other creditors, a ratable proportion of the assets, according to the face of his notes. The proceeds of the sale of the land he is entitled to, upon his notes, to an amount sufficient to pay them, to the exclusion of other creditors; but he has no right, and a Court of Equity will not allow him, to come in with his notes for the entire amount of one thousand dollars against the general assets, and then claim the house and lots, on an application to recover it on the ground that he has not been paid. The estate is alleged to be insolvent. But for that, he might recover the whole amount of his notes from the general assets, and then execute a deed, under the statute, to the heirs-at-law of the intestate, in discharge of his bond.

The judgment of the Court below must be reversed. There

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can be but little difficulty in administering the estate, after the sale made, and the appropriation of the money according to the principles herein stated.

Judgment reversed.

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ALLEN PLEDGER and THOMAS PLEDGER, plaintiffs in error, vs.
JAMES McCAULEY, defendant in error.

Motion to dissolve an injunction on the coming in of the answer, ought to be refused, unless all the equity set up in the bill is denied by the answer.

In Equity, injunction from Catoosa county. Decided by Judge TRIPPE, October Term, 1857.

The facts of this case are sufficiently stated in the opinion of the Court.

AKIN, for plaintiff in error.

HOOPER ; and WALKER, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The error assigned in this case is on the refusal of the Court to dissolve the injunction on the coming in of the answers. The defendant, Thomas Pledger, had taken the assignment of twenty-five *fi. fas.* issued from a Justices' Court in favor of Hickman, Westcott & Co., against the complainant and Allen Pledger, the other defendant. He had ordered some of them to be levied on the property of the complainant, and others he had directed to be returned, and *ca. sas.* to be issued in their stead, and had ordered the complainant to be arrested thereon. The complainant then filed

this bill, enjoining the said executions against the property and the body of the complainant from proceeding, charging them to have been paid off with the money of the defendant, Allen Pledger, and fraudulently assigned to Thomas, for the purpose of harrassing the complainant. Among other things, the bill alleges a partnership to have existed between complainant and the defendant, Allen Pledger, in a mercantile concern, and in certain land and mills; that he sold to the said Allen his interest in both, for a consideration stated in the bill, and in this contract of sale the defendant, Pledger, undertook and agreed to pay off all partnership debts; that the debt on which the said assigned *f. fas.* were issued, was a debt of the partnership, which the said Allen Pledger was bound to pay; that the said *f. fas.* were paid by Allen Pledger, or by his father, Thomas Pledger, with Allen Pledger's money; and so far as the Pledgers were concerned, they were transferred fraudulently, to harrass complainant.

The bill alleges, further, the sale by Allen Pledger of half of the land and mills to his father, Thomas Pledger, for which he took his note; that the defendant, Thomas Pledger, knew at the time of the purchase by him, of the contract by which the said Allen was to pay all the debts of the partnership. There are many allegations of facts and circumstances in the bill, on which charges of fraud are made, which it is unnecessary to set forth here.

The answers of the defendants deny that the partnership extended to the land and mills; that the defendant, Allen Pledger, was to pay the debts of the mercantile concern, to which alone the partnership extended, except from the assets transferred; and states that the individual liability of complainant remained equally with that of defendant, Allen Pledger, for any balance unpaid by partnership effects; denies that he was to pay the debts or anything to complainant, except conditionally, and refers to the note given by him to complainant, on which defendant was sued but never served, and in which suit he alleges a fraudulent confession

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of judgment by an unemployed attorney. The defendants deny that for the assigned writs of *fi. fa.* the money paid was Allen Pledger's money, but insist that it was the money of Thomas Pledger. They deny that the assets of the firm were sufficient to pay the debts; state the amount that was received about \$500; but they set forth no schedule of assets, nor any account thereof.

They deny that the note given by Thomas Pledger to Allen Pledger, for an interest in the land and mills, was not applied to the payment of the debts of the firm; but on the contrary, Allen Pledger says it was transferred to certain creditors of the firm in Augusta, Hand, Williams & Co., as collateral security for the payment of a debt due them, and that he never received one cent from it. Thomas Pledger, in his amended answer, says that he paid the said note to Hand, Williams & Co., two years and six months before it became due, at a discount of twelve per cent.

The answers disclose the fact, that complainant filed a bill in equity against Thomas Pledger and the Sheriff, when a sum of money, raised upon the sale of Allen Pledger's property, on the first Tuesday in December, 1852, was in the hands of the Sheriff, and Thomas Pledger interposed the said transferred *fi. fas.* to claim it, in which bill the complainant charged that the said writs of *fi. fas.*, in favor of Hickman, Westcott & Co., (which were the said transferred *fi. fas.*) had been paid off, and were kept open fraudulently, for the purpose of defrauding complainant; and it was prayed that the said money should be paid to the satisfaction of debts against McCauley & Pledger, and to the complainant, for money advanced by him on the sale of his property, to-wit: fifty acres of land he had purchased with money of the partnership. Before the bill reached a hearing, it was agreed between the parties that the bill should be dismissed; that Thomas Pledger should withdraw the *fi. fas.* transferred to him, and give further time, and that the money in Court should be applied as follows:

1st. To the payment of an execution in favor of G. W. Terry vs. McCauley & Pledger.

2d. To execution of W. W. Waring & Co. vs. McCauley & Pledger.

3d. To the payment in full of two of the twenty-seven *fi. fas.* of Hickman, Westcott & Co. vs. McCauley & Pledger, still in the hands of the original plaintiff.

4th. To the payment in full of a *fi. fa.* in favor of Clayton & Brigman vs. McCauley & Pledger, and the remainder, being \$282 98-100, to the complainant, James McCauley, alleged by him to have been paid by him for McCauley & Pledger.

I believe I have now referred to all the parts of the bill and answers necessary to present the views of the Court. The conditional note referred to in the answers, as set forth in one of the exhibits to Allen Pledger's answer, is in the following words :

" Four months after date I promise to pay to James McCauley, two hundred and eighty-two 98-100 dollars, provided this amount falls due him on a settlement of the firm of McCauley and Pledger, more or less. 16th March, 1852.

[Signed]

ALLEN PLEDGER."

The presiding Judge in the Court below held, upon a full consideration of the bill and answers thereto, that the injunction ought not to be dissolved. There were as many, certainly, as three issues involved in the bill and answers, to be considered by the Court in making up the judgment. First, whether the partnership extended to the land and mills; second, whether the contract, at the dissolution of the partnership, bound Allen Pledger to pay the debts of the partnership irrespective of the assets; and third, whether there was fraud in the assignment of the judgments or *fi. fas.* by Hickman, Westcott & Co. to Thomas Pledger.

In respect to the first issue, the answer of one of the de-

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fendants is, that the complainant, after the establishment of the mercantile concern, attended to the store, and the defendant, Allen Pledger, attended to the mill. According to the answer of the other defendant, he worked sometimes at the store and sometimes at the mill. The conditional note given by Allen Pledger to McCauley, taken in connection with the arrangement made at the time the first bill was dismissed, is some evidence on this point. The amount of the note was to be paid to the complainant, provided that amount falls due to him, on a settlement of the firm of McCauley & Pledger. When the first bill was dismissed, the money in the Sheriff's hands was paid to the debts of McCauley & Pledger, except the sum of \$282 98, which was paid to complainant, for money paid by him for McCauley & Pledger. If McCauley was to pay, why reimburse him from the money of his copartner? The amended answer of Allen Pledger says, that the firm, that is, the mercantile firm of Allen Pledger, was worth about the sum of five hundred dollars only, in notes, books and accounts, and some remnants of goods, and yet, the entire amount of the money in the hands of the Sheriff, raised from the sale of what is stated in the answers to have been the individual property of Allen Pledger, was applied to the payment of the debts of the firm of McCauley & Pledger, and to reimburse McCauley in a sum alleged by him to have been paid for them.

The same facts and circumstances may be referred to in considering the second issue. In reference to the third matter, to-wit: whether the assignment of the *fi. fas.* to Thomas Pledger was fraudulent or not, the fact that he yielded to the demand of McCauley in the first bill, that the money in the hands of the Sheriff should be applied to the payment of debts, exclusive of his own, due by the firm of McCauley & Pledger, and to the reimbursement of McCauley, one of the members of that firm, who was his creditor, if the transfer was free from fraud, is entitled to much consideration.

It is, however, by no means conclusive; for the defendant,

Thomas Pledger, may have had a sufficient motive for his conduct, if the transfer was *bona fide*, and the debt was really due him. But we are now considering whether the equity of the bill was fully denied by the answers. So much for the points above named.

There is another matter connected with these transactions to be noticed. Allen Pledger turned over to Hand, Williams & Co., the notes of Thomas Pledger, as collateral security for a debt due them by McCauley & Pledger. Thomas Pledger bought up that note, having two years and an half to run, at twelve per cent. discount. A creditor holding collaterals has no right to make such a sacrifice of the securities of his debtor. The interest of Allen Pledger was certainly sacrificed in this arrangement, and he had a right to call on his creditor to allow him the full amount of the collateral security, less the legal discount, on his debt; and there being no evidence that he did not submit quietly to the loss, might, taken in connection with his relationship to one of the parties, and the extraordinary length of time to which the credit was extended, be regarded as throwing suspicion on the transactions between him and his father; but it should be remarked that it affords no conclusive presumption of wrong.

Again; the defendant, Allen Pledger, gives no account of the stock of goods on hand, the notes, book accounts, &c.; but contents himself with making a lumping estimate of them all, at about five hundred dollars. He ought to be able to show an account of the stock on hand at that time, and furnish a schedule of notes and accounts due, and what was collected on them. He may be able to make such an exhibit now. The Court below, under all these circumstances, did right in refusing the motion.

Judgment affirmed

Markham vs. The State.

NATHAN M. MARKHAM, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] The possession and occupancy of a house by a person, as a dwelling house, is sufficient evidence of ownership thereof in that person, to support an allegation in an indictment for larceny from the house, that the prisoner entered the dwelling house of that person.
- [2.] When there is no evidence that a boarder hired a particular room to lodge in, it is not error in the Court to refuse to charge the jury, that the indictment ought to have charged the offense to have been committed in the hired lodgings of a boarder.

Larceny and new trial, from Fulton county. Decided by Judge BULL, October Term, 1857.

Nathan M. Markham was indicted for entering the house of Aaron M. Thomason, and stealing therefrom a silver watch, the property of Jeremiah Parker.

Upon the trial the Solicitor General introduced *John Cook*, who swore, that he was boarding at the house of Thomason; Parker and prisoner roomed together; Parker had been in the room two or three months; prisoner two or three days; Parker and witness went into the room one morning, Parker going to open his trunk which was not locked; the same evening prisoner was sitting in the porch about sundown, intoxicated, and remained there till 9 or 10 o'clock; witness, Parker and another man carried him in the room to bed, and as Parker was pulling off his shoes, something dropped on the floor, and a watch was found and picked up; this watch witness had seen Parker have before. They got the Marshal and carried prisoner to the calaboose; While there Parker told prisoner why they had taken him there; that they had found the watch in his shoe, and that the prisoner had broken open his trunk and taken it; prisoner said he had taken the watch off the washstand, and that he carried it to a jeweler's on Whitehall street; witness and Parker went to Marchal's; at the calaboose the prisoner did not deny that it was the watch

Parker claimed; witness had seen it in Parkers possession for months before.

Joseph Marchal sworn, testified, that prisoner brought a silver watch to witness's watchmaker's shop in August, and asked witness to repair it; after he left the watch he came back the same day or the day after; witness laid the watch on the show case and turned away, and when he looked again prisoner and the watch were both gone; it was the same watch as that brought to him by Parker.

D. Brooks swore, that he was with prisoner on the day that he was put in the calaboose, and that prisoner told him that he was going to Cleveland, Tennessee, that night; that he had a watch at the jeweler's to be repaired, which he wished to get before leaving; witness saw him again late in the evening; that he was drunk, sitting down and talking loud; witness took hold of his foot to shake him, to caution him not to talk so loud; felt something in his gaiter which he took out and found to be a small silver watch; witness put it back and left him.

No evidence was introduced by the prisoner.

The Court, among other things, charged the jury, "that if Aaron M. Thomason was in possession and occupancy of the house from which the watch was alleged to have been taken at the time it was taken, that this was *prima facie* evidence of ownership, and sufficient to sustain that part of the charge in the bill of indictment."

Defendant's counsel requested the Court to charge the jury, "that if they believed from the evidence that the watch was taken from the hired lodgings of a boarder in the house of Thomason, that the indictment should have so charged it, and that it was not sufficient to have charged that the watch was taken from the house of Thomason." This charge the Court refused to give, and the defendant's counsel excepted.

The jury found the defendant guilty, and he moved for a new trial on the following grounds:

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1st. Because the verdict is contrary to the weight of evidence, and contrary to law.

2d. Because the Court refused to give the charge as requested by the defendant's counsel above set out.

3d. Because the Court charged the jury as above set out.

This motion was overruled by the Court, and the defendant excepted and filed his bill of exceptions, saying that the Court erred,

1st. In refusing to charge as requested by defendant's counsel.

2d. In charging the jury as he did charge.

3d. In refusing to grant a new trial upon the grounds taken in said motion.

HAMMOND & SON, for plaintiff in error.

SOL. GEN., *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The possession and occupancy of the house by Thomson, was evidence of such ownership thereof in him, as was sufficient to sustain the allegation in the indictment that the prisoner entered his dwelling house.

[2.] There was no evidence that the room from which the watch was stolen, was the hired lodgings of a boarder. A boarder lodged there, but there was no evidence that he had hired that particular room. There being no evidence to support the request made by the prisoner's counsel of the Court to charge the jury, it was not error in the presiding Judge to refuse it.

The verdict of the jury is well sustained by the evidence.

Judgment affirmed.

JOHN DOE, *ex. dem.*, JOHN L. BURKHALTER, plaintiff in error,
vs. RICHARD ROE, *cas. ejector*, and WALTON ECTOR, tenant
in possession, defendant in error.

[1.] An order of Court appointing A. C. C. administrator on the estate of J. B. C., on his giving bond and security in \$1000, with a subsequent order granting A. C. C. leave to sell land as such administrator, is admissible to prove the administration.

[2.] A subsequent purchaser of land having actual notice of a prior unrecorded deed for the same land, is not protected against the claim of the grantee in such prior deed.

Ejectment, from Merriwether county. Tried before Judge BULL, at August Term, 1857.

This was an action of ejectment to recover lot of land No. 255, in the 3d section and 10th district of originally Troup, now Merriwether county.

On the trial, the plaintiff offered in evidence,

1st. A grant from the State to Martha Rozier, dated 31st January, 1828.

2d. A deed from Martha Rozier, made in Warren county, to James Carter, of said lot, dated 6th March, 1830, recorded 25th March, 1852.

3. A deed from James B. Carter, made in Warren county, to John L. Burkhalter, dated 4th March, 1837, recorded 17th Feb. 1857.

Plaintiff then closed.

Defendant introduced and read in evidence,

1st. A deed by Anderson C. Carter, as administrator of James B. Carter, for said lot, to David C. Gresham, dated 5th October, 1852, recorded 3d. November, 1852.

2. An exemplification from the Court of Ordinary of Macon county, ordering letters of administration on the estate of James B. Carter, deceased, to be granted to Anderson C. Carter, upon his giving bond and security in the sum of one

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thousand dollars; and a further order of said Court granting leave to said administrator to sell the real estate of deceased, consisting of lots of land No. 255, in the 10th district of Merriwether county, Nos. 8 and 2 in Appling county.

Plaintiff objected to the introduction of this exemplification on the ground that the order appointing the administrator was not absolute, and that administration could not be proved in this way. The Court overruled the objection.

3. Defendant next offered a deed (quit claim) from David C. Gresham, to Walton Ector, dated 22d June, 1853, recorded 14th January, 1854.

4. Then a deed from A. C. Carter and M. L. Carter, to David C. Gresham of said lot, dated 30th Dec., 1851, recorded 25th March, 1852, and closed.

The Court charged the jury, amongst other things, that in ejectment it was incumbent on the plaintiff to show a legal title in himself, for he can recover only on the strength of his own title, and not on the weakness of his adversary's. That a subsequent deed recorded "within twelve months after it was made, took precedence of a prior deed not recorded within the time. That a deed from the administrator made according to law, was the same as a deed made by the intestate in his lifetime. That the only notice prescribed by the statute, was registry. That a subsequent purchaser with actual notice of a prior *bona fide* title would not be protected against the prior unrecorded deed; but this actual notice should be proven affirmatively.

The jury found for the defendant, and plaintiff moved for a new trial on the following grounds:

1st. That the Court erred in admitting in evidence the exemplification of the records from the Court of Ordinary of Macon county, to prove that Anderson C. Carter was the administrator of James B. Carter, deceased, and in holding that

the order appearing in said record is absolute and unconditional.

2d. That the Court erred in charging the jury that the registry of deeds was the only mode pointed out by the statute, of giving notice of title; but that a subsequent purchaser with actual notice was not protected, though the former deed had not been recorded.

3. Because the verdict of the jury is contrary to law and the evidence.

The motion for new trial was refused, and plaintiff excepted.

HARRIS & BIGHAM, for plaintiff in error.

RAMSEY & KING, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The first error assigned in this case, and which is incorporated in the motion for a new trial, is the admission by the Court as evidence in the cause, the exemplification from the Court of Ordinary of Macon county, of the appointment of Anderson C. Carter, administrator of James B. Carter, dec'd.

[1.] The exemplification shows that he was appointed on his giving bond and security in the sum of one thousand dollars. The Court granting the order was held on the 18th of November, 1851. At the June Term thereafter of the same Court, the same exemplification shows that leave was granted to the said Anderson C. Carter as administrator of James B. Carter, to sell three several tracts of land of the deceased, and among them was the tract of land in controversy. The Court granting the administration ordered the land to be sold, and the legal presumption is that Anderson C. Carter had complied with the terms of the order, and was duly qualified as administrator, and the presiding Judge, therefore, committed no error in admitting the evidence.

[2.] There is no error in the charge of the Court as pre-

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sented in this record. The statute requires deeds to be recorded within a limited time, and if they be recorded within this time, and the party taking the conveyance having been guilty of no fraud, it is notice, and sufficient notice, to the world of his title, and the statute makes it so. The object of the statute is to protect the community against frauds which might be perpetrated or attempted by the grantor by a subsequent sale of the same land, by affording the means of notice. If however, the deed should not be recorded, but a person purchasing subsequently, have actual notice of the previous sale, he cannot be permitted to avail himself of a mere omission, on the part of the prior grantee to record his deed, to commit a wrong on him, when he has all the knowledge necessary to his protection quite as fully as if the first deed had been recorded.

There is no ground to entertain the motion, that the jury found contrary to evidence.

Judgment affirmed.

WILEY H. SIMS, Ordinary, for the use of, &c., plaintiff in error, vs. NATHAN RENWICK and SAMUEL B. COBB, defendants in error.

[1.] A non-resident guardian may sue in the Courts of this State.

[2.] If a ward attain the age of 21, during the pendency of the suit, he may be substituted as party plaintiff in lieu of his guardian, and if he amend his declaration without leave of the Court, or an order of Court, it is no ground to dismiss the action, if he be prepared to make proof of his majority when objection is made. The Court ought to direct the order to be made, now for then.

Demurrer, from Troup county. Decided by Judge BULL, November Term, 1857.

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An action was brought in the Court below, by the plaintiff in error, as the Ordinary for the county of Troup, for the use of Green Talbot, of Tallapoosa county, State of Alabama, non-resident guardian of Moses Barnes, a minor, upon a bond entered into by the defendants in error, as securities. In March, 1845, Reddick Barnes, as principal, and Nathan Renwick and Samuel B. Cobb, as securities, delivered to the Court of Ordinary a bond for \$4,500, conditioned for the due performance of his duties as guardian, by the said Reddick Barnes, who had been appointed guardian of the orphans of William Barnes, deceased. It was averred in the declaration that Reddick Barnes had not duly performed his duties as guardian, for that he had taken into his possession large sums of money and other property, and had never accounted for the same with the said Court of Ordinary, or Green Talbot, the said guardian, nor paid over any of the said property, but appropriated the same to his own use, and that said Reddick Barnes was beyond the jurisdiction of the Court, and refused to pay over the amount. This action was therefore brought to recover from the securities the amount of the said bond.

The plaintiff, upon motion, obtained leave to amend the declaration, and amended the same accordingly, by striking out the words, "for the use of Green Talbot, of Tallapoosa county, State of Alabama, non-resident guardian of Moses Barnes, minor," &c., and inserting in lieu thereof, for the use of Moses Barnes, now of age.

The defendant demurred to the plaintiff's original declaration on the ground that a guardian appointed by the State of Alabama could not maintain the action.

The defendants also demurred to the plaintiff's amended declaration on the grounds,

1st. That the declaration being originally filed by a party

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having no right to sue in the case, the declaration was not amendable at all.

2d. That no amendment could be made substituting the ward as usee in place of his non-resident guardian, although the said ward had become of age pending the action.

3d. That said amendment certainly could not be made without an order of Court granting leave in express terms, to make the same.

Upon hearing the demurrer the Court sustained the same and dismissed the case, and to this decision of the Court, the plaintiffs excepted.

MORGAN and BLECKLEY appeared for the plaintiff in error.

FERRELL, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The action was instituted by the plaintiff in error in the Court below, as Ordinary of Troup county, for the use of the non-resident guardian of Moses Barnes, a minor. The guardian held his appointment of guardian under the authorities of Alabama. The declaration was demurred to on the ground that he had no right to sue in this State. The suit was in the name of a plaintiff having the legal title, a resident of Georgia, and deriving his appointment from the laws of Georgia. The *cestui que* use was a citizen resident of Alabama. But treating it as a suit by the non-resident guardian, it is sustainable under the act of 1837. *Cobb*, 329. Being sustainable the declaration was amendable.

[2.] The ward having attained majority pending the suit, the declaration was amended by striking out the name of the non-resident guardian, and substituting therefor the name of the ward, now of full age. All that was necessary, however was to strike out the part of the declaration in which the name of the non-resident guardian appeared, and the profert

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of his letters of guardianship was made, and the declaration would then have stood complete and perfect for the use of Barnes, the ward. In modern practice in England, where their statutes of amendment are not so liberal as ours, the Courts have allowed the names of plaintiffs, as well as of defendants, to be struck out in actions sounding in contract. 1 *Chitty's Pleadings* 15, note x.

It was objected that the amendment ought not to have been allowed, without an order of Court. Regularly every step taken, in a cause, all amendments, made in term time, ought to be evidenced by an entry on the minutes of the Court. But a cause ought not to be dismissed when such order may be made, now for then. It is not so important when the whole amendment is made by striking out. Under our law, a party may amend as a matter of right, whenever the pleadings are amendable, and for the Court to refuse it, is error. In this case the party who had been the ward, ought to have proven that he had attained majority, and on doing that the case ought to have been sustained, and the Court below ought to have given that direction to the cause.

Judgment reversed.

HUTCHINGS & Co., plaintiffs in error, vs. THE WESTERN AND ATLANTIC RAILROAD, defendant in error.

- [1.] A passenger, for his fare, has a right to have his baggage carried; by which is meant the ordinary wearing apparel customarily carried by travelers, and such other articles as may be needed for his comfort or amusement.
- [2.] Money, except for the payment of expenses, and merchandise not included in the term baggage.
- [3.] Travelers bound to pay customary and reasonable freight for the transportation of money,

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[4.] A person transporting money over a railroad, upon which freight is demandable, cannot defeat the right to exact the freight and recover it, by a fraudulent concealment of it.

[5.] Whatever is carried into the passenger car of a railroad as baggage, is so far considered in the possession of the conductor or agent of the road, as to authorize him to exercise the right of retainer for dues for passage or freight on the article itself.

Case, from Fulton county. Decided on demurrer, by Judge BULL, at October Term, 1857.

This was an action on the case brought by Eusebius Hutchings and John C. Hilton, bankers and exchange brokers, under the firm of Hutchings & Co., against James F. Cooper, Superintendent of the Western and Atlantic Railroad.

The declaration alleged that Hutchings, one of said firm, about the 10th April, 1854, took passage in a passenger car on said road, at Dalton for Atlanta, having paid the usual price for a passenger ticket; and that he took with him into the car, a carpet bag containing about \$87,000 in gold, silver, ore, bullion, bills, notes and drafts, and which he kept in his possession and under his control, at or near his seat; that upon his arrival in Atlanta, the defendant demanded and claimed freight, to-wit: about forty dollars on said carpet bag containing said gold, silver and bank notes, &c.; and upon the refusal of Hutchings to pay the same, defendant seized and took possession of said bag, and detained the same for four days, and delayed and hindered him from proceeding on his journey during that time; and after the expiration of said four days, and upon the payment by plaintiff of \$17 as freight upon said bag, defendant delivered the same to said Hutchings.

Plaintiffs claim damages on account of said seizure and detention, &c.

Defendant demurred to the declaration, and after argument, the Court sustained the demurrer as to all the causes of action, except that founded upon the amount alleged to have been paid by plaintiffs as freight.

To which decision counsel for plaintiffs excepted.

HAYGOOD & WHITAKER, for plaintiffs in error.

OVERBY & BLECKLY, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The plaintiffs sued the defendants in the Court below for the recovery of damages, alleged to have been sustained by them, to a large amount, by reason of the seizure and detention by them, as the agents of the Western and Atlantic Railroad, of a large amount of "gold and silver coin, ore, bullion, &c., bank bills, banker's checks and drafts, acceptances and other assets of great value, to-wit: in all, the value of \$87,000," which were contained, with other things, in a glazed cloth bag, and which one of the plaintiffs had in his own custody, in his own care, at his seat in the passenger car, and which were not placed under the care or in the custody of said railroad, or the conductor of the passenger train, or any other officer or agent of the railroad. On the arrival of the train at the passenger depot in Atlanta, the defendant entered the car and demanded of Eusebius Hutchings, one of the plaintiffs, the possession of the baggage, or the payment of the sum of forty dollars as freight on the gold, according to the published rates of freights on said road, and they refused to allow him to remove the same from the car without the payment of the said forty dollars. The said plaintiff refused to pay, protesting against the right of the defendants to take possession of the said bag, and against their right to make any charge for freight thereon; nevertheless, the defendants refused to allow the plaintiff to remove from the car with the said baggage, and by violence, and with force and arms, took and retained possession thereof for the space of four days, &c., &c.

It is alleged further, that the defendants extorted seventeen dollars from the plaintiff, before they would restore the bags and their contents, which he paid under protest.

The defendants demurred to the declaration, and the Court sustained the demurrer, except as to the plaintiffs' right to recover the seventeen dollars, to which judgment of the Court below the plaintiffs except.

[1.] The plaintiff had paid, at Dalton, when he entered the car, the usual price of a passenger ticket to Atlanta. For this ticket he had a right to have his baggage conveyed. By baggage, is meant the ordinary wearing apparel customarily carried by travelers; and, according to the decision of this Court, other articles for the comfort and amusement of the passenger. *Dibble vs. Brown et al.* 12 Ga. 217.

[2.] Merchandise and money, except money for the payment of expenses, are not embraced under the term baggage, &c. *Hawkins vs. Hopkins*, 6 Hill's N. Y. Rep. 589.

[3.] The declaration shows that this road had published rates for the transportation of gold, and that the sum demanded for freights was upon those rates. It is unnecessary to determine whether the plaintiffs were bound to pay according to the published rates. It is certain that they were bound to pay what is customary and reasonable in such cases.

It is true, that under the circumstances of this case, the plaintiffs may not have been entitled to recover from the defendants if they had lost the money. But not because the State was not liable to pay for losses sustained by travelers on the road, but because the owners were guilty of a fraud, by concealing the fact that their bags contained a large sum of money. *Gibson vs. Peyton et al.*, 4 Burr, 2300; *Batson vs. Denovah*, 6 Eng. Com. Rep. 333.

The declaration, in this case, furnishes strong evidence of a fraudulent concealment of the contents of this traveling bag. It avers that the plaintiff, Hutching, "refused to be catechised, or to answer in any way, as to the contents of said baggage."

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[4.] The plaintiffs, then, were not entitled to carry the money as baggage. They were liable for freight according to published rates, as the declaration shows. The demand, then, made by the defendants of the plaintiff, Hutchings, was a just and legal demand. Could he defeat it by averring that his successful fraudulent concealment had enabled him to reach his point of destination without discovery? We apprehend not.

[5.] There was a doubt on my mind, growing out of the averment in the declaration, that the baggage remained in the possession, care and custody of the passenger, and was never delivered over to the custody of the conductor or other agent of the road, so as to admit of his *retaining* the property for arrearages of passage or freight. But, on reflection, it seems to me necessary and right to hold, that whatever is carried into the passenger car of a railroad as baggage, should be so far considered in the possession of the conductor, or agent of the road, as to authorize him to exercise the right of retainer for dues for passage or freight on the article itself.

Judgment affirmed.

NATHANIEL F. WALKER, ex'or, &c., plaintiff in error, vs. JAMES S. WALKER, et al., defendants in error.

A case pending in Court, and referred to arbitrators, by agreement of the parties, comes under the XXXth section of the Judiciary Act of 1799, and not under the Arbitration Act of 1856; and in such a case, it is error in the Court to direct the award to be entered by the Clerk upon the minutes of the Court, without first hearing and determining the validity of the exceptions filed to the award. The Act of 1856 applies only to cases originating out of Court.

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Award, from Upson county. Decided by Judge CABINESS, May Term, 1857.

A suit in equity was pending in the Court below, and by consent of the parties, the matters in dispute were referred to arbitration, and arbitrators appointed. These arbitrators made their award, to which exceptions were filed by the defendant in the suit.

A motion was then made on the part of the plaintiff, to have the submission and award entered on the minutes of the Court, but without demurring to, or joining issue on, the exceptions of the defendant to the award.

Defendant's counsel resisted this motion, on the ground that they had the right to be heard fully, touching all matters of law or fact arising under the exceptions, and that all those matters should be passed upon by the Court, or by the Court and jury, before the award should be entered on the minutes, as the entry of the award on the minutes would make the same the judgment of the Court. That the defendant would be greatly narrowed down in his means of defense against the award, and of his rights of attack upon the award, under the stringent provisions of the late Act on the subject of arbitrations.

After argument, the Court declined to give any opinion as to the validity of the award, but granted the motion to enter the submission and award on the minutes of the Court, and made an order accordingly.

To this decision of the Court defendant's counsel excepted, and filed his bill of exceptions, assigning the same as error.

GIBSON; COBB; GREEN; and PEEPLES, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This case was pending in the Superior Court of Upson county; and by agreement of the parties, was referred to arbitration. The award, or what purported to be such, was returned into Court, and a motion was made to cause the same to be entered by the Clerk, on the minutes of the Court. Various exceptions were filed to the award, to which the plaintiff neither demurred nor took issue, but insisted on his motion. The Court declined to express any opinion as to the validity of the objections, but granted the order directing the award to be entered by the Clerk upon the minutes. To which ruling the defendant excepted, and now assigns the same as error in the Court.

It is quite apparent, that the argument before this Court has taken quite a different direction from what it did in the Court below. For whatever disclaimers may be made now, the question was treated by counsel on both sides, as well as the Court, as falling within the Act of 1856. Otherwise, the motion by Mr. Hill would have been to receive the award, and make it the judgment of the Court; and not to enter the award preliminarily upon the minutes, as directed by the Act of 1856, in order to give the Court jurisdiction of the case. Counsel for the defendant resisted the motion for the same reason, apprehending that if the application was granted, and the award entered upon the minutes, they would be shut in by the Act of 1856, to but a solitary objection, and that was fraud and corruption in the arbitrators. And the Judge, thus misled, took the same view of it, as the bill of exceptions abundantly shows.

It turns out, however, that this proceeding was not under the Act of 1856, but under the XXXth § of the Judiciary Act of 1799, authorizing the submission to arbitrators, by agreement of parties, of a case already in Court. *Cobb*, 487. And counsel, now, upon sober-second thought, all concur in this opinion. And if this be so, the Court erred in directing the award to be entered upon the minutes of the Court, before hearing and determining the validity of the exceptions filed

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to the award. And the motion should have been, to make the award the judgment of the Court, when all the exceptions should have been considered and decided before any other action was had. If the objections or any of them had been sustained, then the award would be set aside; otherwise, it would have been made the judgment of the Court. And under the Judiciary Act of 1799, it is only in this way—the judgment reciting the award, and thus making it a part of the judgment—that it can get upon the minutes. In other words, it goes upon the minutes as a judgment, and not merely as an original award. It is only under the Act of 1856, which applies exclusively to cases originating out of Court, and not to cases pending in Court and referred to arbitrators by the order of the Court, or upon the agreement of parties, that an award, as such, can be put upon the minutes. And as it is a new case brought into Court, this provision was made to give the Court jurisdiction.

If an arbitration is had in terms of this Act, the party in whose favor it is rendered, is entitled to bring it into Court, put it upon the minutes, and have it enforced as a judgment, instead of being compelled to sue upon the award, as heretofore. To entitle a party to the right, however, the terms of the Act must be pursued. With some amendments, this may be a good law. Restricting the grounds of exception, alone to fraud and corruption in the arbitrators, it will soon become obsolete, for nobody will risk their rights under it.

Judgment reversed.

**ELIZABETH WOODS, plaintiff in error, vs. GUSTAVUS T. SYMMES,
and others, defendants in error.**

To entitle securities, upon a bail bond in trover, to the writ of *ne exeat* against the administratrix of their principal, it is not sufficient to allege, merely, that she is insolvent, and that complainants are informed, and believe, that the negroes in dispute will be removed beyond the limits of the State, and leave them bound for their production, in the event of a recovery.

In Equity. Decision on demurrer, by Judge RICE, at chambers, November 24, 1857.

This was a bill filed by Gustavus T. Symmes, Robert H. Moore and James L. Howell, against Elizabeth Woods, administratrix of William Woods, deceased.

The bill states that an action of *bail trover* was instituted against the said William Woods, in his lifetime, for the recovery of certain negroes; and that complainants, with one other person, who has since removed from the State, became his sureties on a bond in a penalty of three thousand dollars, conditioned that he should produce said negroes, to answer such judgment and execution as might be rendered against him in said action of trover, &c.

The bill further states, that since the execution of said bond, their principal has departed this life intestate, and administration on his estate has been granted to his widow, the said Elizabeth, who has become insolvent; and that complainants are informed, and believe, that said negroes will be removed beyond the limits of the State, thus leaving complainants bound for their production, in the event of their recovery, or to pay the penalty of said bond.

The bill prays, that complainants be protected and saved harmless from their liability in the premises, by compelling said Elizabeth to give bond, with good security, for the production of said negroes, or else to deliver the same to the Sheriff of said county, to be produced to answer such judgment as may be rendered in said action of trover.

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To this bill defendant demurred. The presiding Judge overruled the demurrer, and ordered defendant to answer the bill, to which decision she excepted.

WM. MARTIN, for plaintiff in error.

IRWIN & LESTER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

One Andrew Howell commenced an action of trover against Wm. Woods, the intestate of Elizabeth Woods, to recover some negroes; and sued out bail process, under the statute. The complainants in the bill became securities for the defendant, in a bond of \$3,000, for the forthcoming of the negroes, to answer to the recovery, should any be had. Wm. Woods, the defendant, died; and Elizabeth Woods administered upon his estate, and was made a party to the suit, which is still pending. This bill is filed by the securities, suggesting the foregoing facts; and that Elizabeth Woods is insolvent, as they are informed and believe; and praying that the writ of *ne exeat* may issue, and that said Elizabeth Woods may be compelled to secure the payment of the sum of money for which they are bound, or to deliver said negroes at the time and place mentioned in the original bond. And the only allegation upon which the writ of *ne exeat* is prayed, is, that the complainants "are informed, and believe, that the negroes in controversy will be removed beyond the jurisdictional limits of the State, leaving the complainants liable upon their said bond." The jurat is in the ordinary form of affidavits to bills in equity.

This proceeding is under the Act of 1813, (*Cobb*, 525,) which extends the remedy by *ne exeat* to a class of cases to which it did not apply at common law, viz: to demands not due in certain cases; and in favor of co-obligors who are bound for the payment of money, or the delivery of property at a future

time. The preamble to the Act recites, that no provision is made for co-obligors when a part of them remove, or are about removing without the jurisdictional limits of the State, without making satisfaction for the liability to be incurred, &c. And again, in the second section it declares, that securities shall have the benefit of this remedy, when the principal or either of the securities are about removing without the limits of the State, &c.

It is doubtful, under this statute, whether the party is entitled to this remedy upon an allegation merely, however strongly made, *that the property will be removed*, but without averring that the person designs removing.

But waiving this, and assuming that the Act is in the alternative, and that "and" should be read "or" in the second section, that the co-obligor is about to remove without the limits of the State, or is carrying off his property, still the allegation in the bill is defective. It states no fact; it simply affirms that the complainants are informed and believe that the property in dispute will be removed out of the State, so as not to be forthcoming to answer the judgment which may be recovered. Looking upon this Act as in the nature of equitable bail, perhaps the allegation might be tantamount to a positive averment, that the complainants are apprehensive of being made chargeable with the whole amount of their liability, or some part thereof, unless the writ of *ne exeat* do issue. The statement in this bill is hardly so broad as this. They state nothing of their own knowledge. Who gave them the information upon which their belief is founded, the bill does not disclose. No affidavit of the informant accompanies the bill. This bill may be amended, or a new one filed, with allegations sufficiently certain and issuable to be maintained. As it stands, it needs strengthening; especially as the Act of 1813 itself declares, that in all cases originating under it, the party complainant shall pursue the *legal forms and course of law* heretofore practiced in this State. It will hardly be contended, that the alle-

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gation in this bill would be good at common law, and we hold it not good in this case, the liability being but contingent at most; and notwithstanding the alleged insolvency of Mrs. Elizabeth Woods, the administratrix, she must be presumed to have given sufficient security for the faithful administration of her husband's estate. At any rate, if the security already given be inadequate, it can be made good, or she removed from her trust, and the property taken out of her custody.

Judgment reversed.

GILBERT E. D. FALLS, plaintiff in error, vs. JOHN M. GRIFFITH, adm'r, defendant in error.

It is not necessary to the validity of a claim of land at executors or administrators sale, that bond and security should be given.

Claim, from Fannin county. Decided by Judge RICE, November Term, 1857.

This was a claim for a lot of land. When the case came on, the administrator moved to dismiss the claim on the ground that no bond and security had been given. The Court held that it was incumbent on the claimant to file a bond as well as affidavit, which it was admitted had been filed. Claimant's counsel then offered to prove that he, claimant, was under the age of 21 years, but had since attained that age, and moved the Court to permit the claimant then to file such bond as the Court held to be necessary. The Court overruled the motion holding that if an insufficient bond had been filed it might have been amended, but

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no bond having been filed the Court had no discretion in the matter; and to this decision claimant excepted.

MARTIN, for plaintiff in error.

CHASTAIN & UNDERWOOD, *contra*.

By the Court—**MCDONALD**, J. delivering the opinion.

As we reverse the judgment of the Court below, on the ground that said Court erred in deciding that a claimant of land advertised for sale at administrator's sale, must give bond and security as in cases of claims of property levied on by attachment or execution, it will be unnecessary to consider the other ground of error assigned in the bill of exceptions.

The right to claim land advertised for sale at executors or administrator's sale is the creature of a statute. The statute authorizing it, requires the claimant, by himself, his agent, or attorney, to file with the Ordinary, such claim on oath; and to serve a copy on the executor or administrator, previous to the day of sale. This is all that the statute requires of the claimant. It is made the duty of the clerk (now the Ordinary) to transmit the claim to the next Superior Court of the county where the land lies. No bond is required, and we have no power to annex to a claim of this sort, a condition that a bond must be given, merely because the Legislature has made the giving a bond and security, a condition to a claim of another description.

The statute requires that the right of property in such cases shall be tried upon an issue made up, in the same manner and under the like regulations, restrictions and penalties as are laid down, in the Judiciary Act, for the trial of the right of property levied on under executions. This clause of the act has reference to the trial of an issue made up on a claim already regularly filed under the statute. It may be tried as prescribed, without a bond, and it is not to be inferred, neces-

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sarily, that a bond must have been given. If damages are given on the trial against the claimant, on the value of the property claimed, as a penalty for making an unfounded claim, the only difficulty is, that the executor or administrator has no security for their payment, except the responsibility of the claimant.

Judgment reversed.

NATHAN F. CAMP, plaintiff in error, vs. BANCROFT, BETTS & MARSHALL, defendants in error.

In Equity, from Butts county. Decided by Judge CABINNESS, at July adjourned Term, 1857.

Nathan F. Camp executed a mortgage of two slaves to Bancroft, Betts & Marshall, merchants of the city of Charleston, South Carolina, to secure two promissory notes given by said Nathan F. and his brother, James B. Camp. The mortgage bears date 7th January, 1856. The notes are of the same date, and one for \$535 56, due ten months after date; the other for \$1383 39, and due 1st May, 1857.

Before these notes became due, Bancroft, Betts & Marshall, apprehending that the negroes mortgaged would be removed from the State and their debts lost, filed their bill of *quia timet* against Nathan F. Camp, the mortgagor, and prayed that he might be required to give security for the production and forthcoming of said slaves to answer complainants' demands. The bill was sanctioned by the Chancellor, and Camp ordered to give the security prayed for. This bill was filed and sanctioned 1st July, 1856.

About the same time, Nathan F. Camp filed his bill against Bancroft, Betts & Marshall, alleging the foregoing facts, and

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claiming that the large note, for \$1383 39, mentioned in said mortgage, was given and executed by himself and his brother, for and in lieu of two other notes, then held by Bancroft, Betts & Marshall, against said James B. Camp, and which notes they agreed to deliver to him, Nathan F., but which they have failed and refused to do, and complainant thereby prevented from collecting, or taking any steps to collect said notes; whereby he has been greatly damaged, and prays that said defendants be enjoined from negotiating said note against him and his brother, and that the demand of said Bancroft, Betts & Marshall be abated or reduced an amount equal to said two notes which they represented they held upon said James B. Camp, and which they agreed to deliver to complainant as aforesaid.

At the July adjourned Term of Butts Superior Court, complainant moved to amend his bill, by alleging that since the filing of his original bill, Bancroft, Betts & Marshall have taken steps to foreclose their mortgage and have caused a *fi. fa.* to issue, which has been levied upon the negroes mortgaged; that defendants reside beyond the limits and jurisdiction of this State, and complainant can have no adequate remedy against them except by obtaining a credit here, upon their demands, for the amount of damage he has sustained by their actions and refusals in the premises. That said notes of James B. Camp, have never been returned or delivered to him, and from all the circumstances he does not believe said notes ever existed; and prays that defendants be enjoined from collecting so much of their demand as is equal to said notes, to-wit: \$1383 39; and from collecting and enforcing their said mortgage *fi. fa.* to this amount.

Counsel for defendants objected to the amendment. The Court, after argument, sustained the objection and refused to allow the amendment, and counsel for complainant excepted.

D. J. BAILEY, for plaintiff in error.

JNO. J. FLOYD, *contra.*

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By the Court.—BENNING, J. delivering the opinion.

The matter of the proposed amendment, was matter of “substance.” The amendment act of 1854, says, That “plaintiffs and defendants,” “whether at law, or in equity, may in any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form, or matter of substance.”

This plaintiff, then, we think, had the right to add the proposed amendment, to his bill.

Judgment reversed

NATHANIEL F. WALKER, plaintiff in error, vs. JAMES S. WALKER, adm'r, &c., defendant in error.

- [1.] Where there is a conflict of testimony and a portion being disregarded, for want of credibility in the witness, it being apparent that they were incapable from non-age to understand the facts about which they testify, and the balance preponderates in favor of the verdict, it is not error in the Court to refuse to grant a new trial, on the ground that the verdict was contrary to the evidence.
- [2.] The failure of the representatives of an estate to inventory and sell a portion of the property found in possession of their intestate, at his death, but claimed by a third person, ought not to prejudice the title of the estate; provided the circumstances were such as satisfactorily to account for the omission.
- [3.] If one, by his will, undertakes to dispose of property claimed by another, and in his possession, the will is no evidence of claim until its publication; no knowledge of its contents being brought home to the opposite party. Neither can the inventory and appraisement of such property, by the executor, be given in evidence in support of his testator's title; suit having been brought within five years from the death of the testator.
- [4.] If a trustee collude with a third person, to defraud his *cestui que trust*, the statute of limitations does not begin to run until after the fraud is discovered.

Trover and new trial, from Upson Superior Court. Decided by Judge CABINNESS, November Term, 1857.

An action of trover was brought by James S. Walker, as administrator *de bonis non*, of the estate of William W. Walker, deceased, against Nathaniel F. Walker, to recover certain negroes.

Upon the trial the following evidence was introduced by the plaintiff:

John Harrison testified that in 1828 he lived with William W. Walker, deceased, working on his plantation; knew the negro Hannah referred to in the cause. Samuel Harrison was brother to witness, and Nancy McDaniel his sister. In 1828 the former 3, and the latter 10 years of age.

Davis Dawson, heard a demand made by the plaintiff of the defendant in the year 1851, for the negroes Hannah and others. Defendant refused to give up the negroes. Plaintiff gave witness a list of the names of the negroes demanded in order to enable him to recollect them, and plaintiff told him he would be called as witness of the demand.

Jesse Arrington testified that he lived as overseer to William W. Walker, in 1830, and lived half a mile from him at the time of his death. The negro Hannah was in possession of Walker at the time of his death. She had 6 children. Wm. Walker exercised acts of control over them.

Silvanus Gibson, knew Hannah and children. She had been in the possession of defendant since 1830.

Benjamin Walker, knew Hannah in the possession of Wm. W. Walker; first went into his possession in 1823 or 1824; he brought her from Putnam county, and she remained with him till his death.

The defendant introduced the following evidence.

Mary Owen testified that she knew Hannah to be in James Walker's possession from 1834 or 1835; thought Hannah was in possession of Wm. W. Walker till the time of his death. Did not know how Nathaniel Walker got possession of them except it was by the death of his mother.

Nancy McDaniel testified she knew the negro Hannah;

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she belonged to James Walker. She heard Wm. W. Walker say that Hannah belonged to his father, James Walker; that Rebecca, belonging to Wm. W. Walker, was taken ill in the arms, and James Walker sent Hannah to Wm. W. Walker to cook for him until Rebecca got well; that during the stay of the said Hannah at Wm. W. Walker's the father of witness was going to whip her, and Wm. W. Walker told him not to do so, as if he did his father would send for her and take her back home.

Answers of Samuel Harrison to the same effect as the testimony of the last witness.

The defendant then introduced the order of the Court of Ordinary for Upson county, granting letters of administration to Mary C. Walker and Allen M. Walker, on the estate of the said Wm. W. Walker.

Henry Butt testified that when he first knew Hannah she was in the possession of James Walker. James Walker's business was managed by Nathaniel and Allen Walker; never saw Hannah any where but at James Walker's.

E. Atwater, knew Hannah from the death of Wm. Walker; knew Hannah at the place of James Walker; she was used as his property.

James Howell knew Hannah and her children; they were kept on his place and made a crop. James Walker took possession of Hannah and her children after the death of Wm. W. Walker, in the presence of Nat. and Allen Walker, as his own property, and without opposition from them.

Dempsey Jordan testified to the same effect; as also did *Peter P. Butt*.

The will of James Walker was offered in evidence by the defendants; and also the records from the Court of Ordinary of Upson county.

The plaintiff objected to the admission of these in evidence, and the Court rejected them.

The Court charged the jury that, "If Wm. W. Walker died in possession of the negroes in dispute, and had possession of them for many years before his death, that was *prima facie* evidence of title, and conclusive until a better title was shown."

"If James Walker took possession of the negroes after the death of Wm. W. Walker, it is incumbent on the defendant who claims under him, to show his right to take them, and you must look to the evidence to satisfy yourselves whether he had such right."

"If the negroes were loaned to Wm. W. Walker, by James Walker, James Walker did not part with the title to them, or dominion over them, but had the right to resume possession of them when the loan was at an end. If you believe from the testimony, that Wm. W. Walker held the negroes under James Walker, as a loan, James Walker had the right to take them into his possession upon Wm. Walker's death; and you will find for the defendant; but if you are not satisfied by the evidence that Wm. Walker held the negroes as a loan from Jas. Walker, then you will find for the plaintiff, unless the defendant has succeeded in showing a title under the statute of limitations. To constitute title under the statute of limitations the possession must be adverse, and must have continued four years preceding the commencement of the suit."

"If when James Walker took possession of the negroes, he and Allen and Nat. Walker held them jointly, and worked them on a farm held by them jointly, and if the negroes were still under the control and dominion of Allen M. Walker, though that control was exercised jointly with James and Nat. F. Walker, while such joint possession was held by James, Allen and Nat. Walker, the statute of limitations did not run against Allen M. Walker as the administrator of the estate of Wm. W. Walker; his possession enured to the benefit of the estate so far as to protect it against the statute of limitations, so long as such possession continued. But if James Walker took possession of the negroes in his own right

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and in the presence of the administrators, or either of them, and claimed and held them as his own property, that constituted adverse possession, and the statute of limitations commenced running from the time the negroes were so taken and claimed, and the right of action accrued to the administrators of Wm. W. Walker, and if suit was not commenced within four years from the time such right of action accrued, the plaintiff is barred by the statute, and you should find for the defendant."

The Court then, at the request of defendant's counsel, charged the jury that, "Upon the death of Wm. W. Walker, the title to his negroes vested in Allen M. Walker and Mary C. Walker, his administrators, and they were bound to protect that title, and if James Walker asserted title to said negroes and acquired possession of the same as his own, and used them for four years, it constitutes statutory title by which the administrator *de bonis non* is bound. If James Walker held the negroes as the property of Wm. W. Walker, by the consent of Allen M. Walker, that is not adverse possession; nor would it be adverse possession if James Walker held possession under the control and direction of Allen M. Walker, for that would be holding for Allen M. Walker. But the jury must be satisfied by the evidence that James Walker so held them in order to relieve him from the statutory title."

"And while it is true that a fraudulent possession of said negroes by James Walker, in collusion with Allen M. Walker, would not be good against the rightful administrator of Wm. W. Walker, yet the jury must be satisfied by the evidence in the case of such collusion and fraud, for the law never presumes fraud; it must be proved by positive or circumstantial evidence."

"If Allen M. Walker or Mary C. Walker, or either of them, by negligence, suffered the title to these negroes to be divested out of them, and to be acquired by James Walker without asserting the right of the estate of the said Wm. W. Walker the administrator *de bonis non* has no right to recover the

negroes; and if James Walker acquired a good statutory title by 4 years adverse possession of said negroes against Allen M. and Mary C. Walker, then it is good against the plaintiff; and if there were negligence by the first administrators they are answerable to the heirs at law of Wm. W. Walker for their default."

"Where a party sets up fraud to protect him from the effect of a statutory title, the statute begins to run in favor of the defendant as soon as the plaintiff discovers the fraud." (The Court added here, at the request of the plaintiff, "if there was fraud and collusion between James and Allen M. Walker in taking possession of and holding the negroes after the death of Wm. W. Walker, the statute of limitations did not run in their favor until the discovery of the fraud, and if James S. Walker, the administrator *de bonis non*, commenced his action within four years after the discovery of the fraud, he is not barred by the statute.") "And if James Walker acquired a good statutory title against Allen M. Walker, as the administrator of Wm. W. Walker, then the administrator *de bonis non* is not entitled to recover."

At the request of plaintiff's counsel, the Court charged the jury, "that when property is in the joint occupancy of two or more persons, and one of them has the title, the possession is in the one who holds the title. If the negroes in this case were held jointly after the death of Wm. W. Walker by Allen, James and Nat. F. Walker, and if the title was in Allen M. Walker, the possession of the negroes was in him; if the title was in James Walker, the possession was in him."

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial upon the following grounds:

1st. Because the verdict is against the law and evidence in the case, and against the charge of the Court.

2d. Because the verdict is against the weight of the evidence.

3d, 4th, 5th and 6th. Because the Court erred in refusing

to allow the defendant to read in evidence the appraisement of the said Allen M. Walker and Mary C., administrators of William W. Walker, deceased, and their returns of sales of his property, and the appraisement of Nathaniel F. Walker, executor, and the will of James Walker, deceased.

7th. Because the Court erred in charging the jury, "if there was fraud and collusion between James and Allen M. Walker in taking possession of and holding the negroes after the death of Wm. W. Walker, the statute of limitations did not run in their favor until the discovery of the fraud, and if James S. Walker, the administrator *de bonis non*, commenced his suit within four years after the discovery of the fraud he is not barred by the statute."

The motion for a new trial was refused by the Court, and defendant excepted.

GIBSON, GREEN, and PEEPLES, for plaintiff in error.

SMITH, FLOYD, and B. HILL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

I will consider the grounds in the motion for a new trial in their order.

1, 2. Because the verdict was against the law and weight of evidence in the case, and against the charge of the Court.

The evidence in the case was conflicting: rejecting the evidence of the two witnesses, brother and sister, who are proven to have been too young to testify understandingly, as to the facts to which their evidence relates, one of them being three years old only at the time; and the verdict is in accordance with the preponderance of the proof. And as to its being contrary to the law and the charge of the Court, such was not the opinion of the Judge, who presided at the trial; nor is it our opinion.

3, 4, 5, 6. The next four grounds may all be considered together.

We think the Court was right in not permitting the defendant to read in evidence the appraisement and returns of sales of property of the estate of Wm. W. Walker, deceased, by his administrator and administratrix. The object of this proof was of a negative character; that is, by showing that the negroes in dispute were not inventoried and sold, with the rest of his slaves, by his legal representatives, it might be inferred that they knew they belonged to old James Walker, and not their intestate. It would be going very far, we apprehend, in any case, to allow the title to valuable property to be taken from minors by an act of omission of this sort, whatever the motive might be. But considering the relationship which existed between these parties, we hardly think the conduct of the representatives should weigh anything against the title of W. W. Walker's estate to these slaves. The administrator was the son, and the administratrix the daughter-in-law of James Walker, who was an aged man at that time. At the end of the year, after the death of his son, William W. he claimed the negroes, and took them home with him, notwithstanding they had been in the peaceable possession of his son for about eleven years before his death. Policy, for fear of offending him, as well as filial respect, might well have induced these parties so far to acquiesce, as not to resist his will, and thereby rouse the old man to anger and resentment by inventoring and offering for sale, these slaves with the rest of the property of the intestate. Besides, the widow, was a woman who but imperfectly understood her rights; and naturally looked to Allen M. Walker, her brother-in-law, and co-administrator, to do whatever the law required. And that is not all, she intermarried again in about fourteen years after the death of her husband, which, by operation of law, abated her letters of administration; and again, Allen M. was living with his father and might have supposed that by continuing in the joint possession of these negroes, upon his father's place, as he did, that this would be a sufficient protection of his brother's title. Under all these circum-

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stances we do not think that any inference should be made to the prejudice of W. W. Walker's estate, on account of the failure of the representatives to assert their intestate's title to this property.

It may be that Allen M. Walker connived at the claim of his father. His interest was all on that side. It would be going very far to allow such proof to weaken even, the title of W. W. Walker's child, or children, to these negroes.

As to the appraisement of Nathaniel F. Walker, as the executor, it is very clear that this evidence was properly excluded. James Walker's will was made in 1828, when W. W. Walker was in possession of the negroes. He continued in possession until his death, in 1834. What if James Walker did undertake to dispose of these negroes by his will? It amounts to nothing. There is no evidence that the contents of the will ever came to the knowledge of W. W. Walker; much less that he sanctioned or approved of them. Indeed, until the death of James Walker, in 1849, and the publication of his will, no one knew of the testamentary claim thus attempted to be asserted, and this suit was brought within four years from that time.

[7.] The last ground is, that the Court erred in charging the jury that if James Walker and Allen M. Walker colluded together to defraud the estate of W. W. Walker out of these negroes, that the statute of limitations did not begin to run until after the fraud was discovered.

We see nothing wrong in this charge. The heirs of W. W. Walker, deceased, should not suffer by the fraudulent misconduct of their trustee, and it is not a good reply to say, that he is personally reliable to his *cestui que trust*. Why should not the fraud be made to effect the conscience of his confederate? Shall his title, originating in covin with the trustee, be protected? The tendency of our legislation, as to land titles, is strongly opposed to this doctrine. And it would seem to me that where the question is between an orphan child on the one side, and the original parties to the transac-

tion on the other, no interests of third persons being involved, there can be no doubt but the principle was correctly stated by the Court.

Being satisfied with the verdict, and seeing no error, either in rejecting evidence or the charge of the Court to the jury, we do not feel constrained to overrule the discretion of the Court in refusing to grant a new trial in this case; and consequently affirm its judgment.

Judgment affirmed.

JOHN CARTRIGHT, plaintiff in error, vs. JOHN P. CLOPTON, defendant in error.

On the trial of a case, when the evidence had closed, the Court "directed counsel for the plaintiff, to go on and state his points relied on for a recovery, to the jury. Plaintiff's counsel did so. Defendant's counsel then asked the Court, to give the law in charge to the jury; whereupon, counsel for the plaintiff, insisted that he had a right to argue his case to the jury." The Court refused to allow him to do so. *Held*, that the Court erred.

Assumpsit, from Merriwether county. Tried before Judge BULL, August Term, 1857.

This was an action of assumpsit by John Cartright against John P. Clopton, on the following promissory note, to-wit:

"Eight months after date we or either of us promise John Cartright or bearer, the sum of one thousand dollars, with interest from date, value received. April 2d, 1855.

[Signed]

L. C. CLOPTON,

J. P. CLOPTON, Sec'y."

The suit was against the security only.

The defendant pleaded, first, The general issue. Second,

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A special plea, that the note sued on, was given as collateral security for a draft negotiated by L. C. Clopton, to plaintiff, and which note was to be given up when a Mr. Enoch, a lawyer of Texas, should say that the draft could be collected; and defendant avers that Enoch has so said that the draft could be collected, and of which plaintiff was informed, &c.

Under the charge of the Court the jury found for the defendant, and plaintiff moved for a new trial upon the following grounds, to-wit:

1st. Because the Court erred in admitting the testimony of Pleasant P. Clopton and William P. Elbert, to prove the contract by which the defendant insists that the note sued on was paid, the said testimony tending to vary the contract contained in the note.

2d. Because the Court erred in refusing to give in charge to the jury, the law regulating the admissibility of parol evidence to vary, add to, or alter written contracts, and in assigning as a reason for said refusal, that there was no evidence that said agreement set up by defendant, in discharge of said note, was made prior to, or contemporaneously with, the giving of the note.

3d. Because the Court erred in refusing to admit in evidence the draft drawn by L. C. Clopton, on Allen & Terrell, upon the ground that said testimony was irrelevant.

4th. Because, after the testimony was closed, and the plaintiff's counsel, under the direction of the Court, stated his points, and the defendant's counsel declined to argue the case to the jury, the Court erred in refusing to permit plaintiff's counsel to go on and argue his case, holding that he was not entitled to submit any further arguments or remarks to the jury.

5th. Because the jury found contrary to law and evidence.

The presiding Judge overruled the motion for a new trial, and plaintiff excepted.

Mr. MALL, for plaintiff in error.

Messrs. ADAMS, and KNIGHT, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in refusing the motion for a new trial?

The first and second grounds of the motion, are founded upon the assumption, that the parol evidence objected to, proved a contract *contemporaneous* with the giving of the note sued on. But that evidence, as we think, proved a contract *subsequent* to the giving of the note. We think, therefore, that there is nothing in these two grounds.

As to the third ground. I think, that the draft was admissible. The fact that it was in the possession of the plaintiff, would tend to show, that its surrender to L. C. Clopton, was *not* the consideration of the note, and, therefore, would tend to discredit the two witnesses, P. P. Clopton and W. P. Elliott, who swore, that they heard the parties to the note say, that the surrender of the draft to L. C. Clopton, was the consideration of the note.

“A collateral fact is not in general evidence to discredit a witness. But where a witness swore that a party had acknowledged two instruments to have been made by him, evidence was admitted, that one of them was forged.” 2 *Stark Ev.*

Again, I am not prepared to admit, that this is a collateral fact.

The question whether the note sued on, was the *same* note as that referred to by the two witnesses, was a question not collateral to the issue, but a question directly involved in the issue.

The note to which they had reference, was one the consideration of which, was, as they understood it, the surrender of this draft.

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The draft was in fact, not surrendered. This is a fact from which it may be argued, that the note sued on is not a note which had the surrender of the draft for its consideration, and therefore, that it is not the note referred to by the two witnesses. True, the fact is such a one, that it is susceptible of being used in this way, in reference not only to this note, but to any other possible note between the same parties. But does this show, that the fact is not one calculated to disprove the identity of the note sued on with that of which the two witnesses testify. I do not see that it does.

In *my* opinion, then, the draft was admissible; and, I believe, that in this opinion, Judge Lumpkin agrees with me.

As to the fourth ground, in the opinion of Judges Lumpkin and McDonald, this was a good ground, and I agree with them, if the Court, in directing "counsel for the plaintiff to go on, and state his points relied on for a recovery, to the jury," meant to restrict such counsel to a naked statement of mere *points*, to the exclusion of argument in support of the points. If the Court did not mean this, but meant, that the counsel was to go on and argue his case to the jury, and he chose merely to state his points and not argue them, I am not prepared to say, that I think the Court erred. How the fact was in this respect, is not clear from the record.

We all agree, that there should be a new trial.

Judgment reversed.

Horton & Rikeman vs. Moyers.

HORTON & RIKEMAN, plaintiffs in error, vs. F. B. MOYERS,
defendant in error.

A lot of land is sold under a proclamation by the Sheriff that it is sold to pay the purchase money, which is understood by the by-standers to mean, to satisfy the vendor's lien, and it is so meant by the Sheriff, and it turns out to be a mistake—no deed having been executed and filed, in compliance with the statute.

Held, That the sale will be rescinded at the instance of the bidder, and a re-sale ordered.

The facts necessary to an understanding of this case, are sufficiently stated in the opinion of the Court.

PRINTUP, for plaintiff in error.

UNDERWOOD, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Alfred Shorter sold lot No. 46, in the city of Rome, to Jonathan G. McKenzie, for \$400; took the notes of the purchaser, and gave a bond for titles. McKenzie sold one-half the lot to Felix B. Moyers, who put valuable improvements thereon, and mortgaged the other half to Horton & Rikeman. Shorter sued the notes given by McKenzie to judgment, and sold the lot under the *fi. fa.* issuing thereon; the Sheriff making proclamation that the lot was sold to satisfy the vendor's lien, and Horton & Rikeman giving notice at the same time of their mortgage lien; Moyers supposing that the title would be good, as the vendor's lien was paramount to any and all others, bid \$317 for the property, and it was knocked off to him at that price. The mortgagees are proceeding to foreclose their mortgage, for the purpose of selling the one-half of the lot mortgaged to them. Moyers filed his bill to enjoin them, and for the refusal of the Court to dissolve the injunction, this writ of error is prosecuted.

It turns out that Shorter had not filed his deed to the lot, as required by the statute, and yet, the effect of the Sheriff's

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proclamation was to induce purchasers to believe and bid as though he had. The Sheriff, without intending it, stated what was not true, and legally could not be true. Would it be just to Moyers to let the sale stand, and he lose the purchase money? We think not.

The equity of this case is, to rescind the former sale; and now that a deed has been executed and filed by Shorter, bring the lot again into market, when it can be fairly sold, and purchasers bid understandingly.

But to accomplish this, the bill has to be amended, so as to make Shorter a party; and the prayer should be amended, asking for a rescission of the former sale, and a re-sale of the lot.

Judgment reversed.

E. J. DOZIER, adm'r, plaintiff in error, vs. RICHARDSON, HARTSFIELD & Co., defendants in error.

H. died pending a suit against him; afterwards, an order was passed making his administrator, D., a party in his place—the order reciting, that D. had been served with a *scire facias*. D. moved to set aside this order, alleging that he had not been so served.

Held, that the recital in the order, did not conclude him from proving his allegation.

Motion to set aside judgment, from Upson county. Tried before Judge CABINESS, at November Term, 1857.

This was a motion by Erasmus J. Dozier, administrator of Tarpley T. P. Holt, deceased, to vacate and set aside a judgment obtained against him as administrator, at February Term, 1856, of the Inferior Court of Upson county, in favor

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of Richardson, Hartsfield & Co., for \$673 15, besides interest and cost.

It appeared, that pending the suit of Richardson, Hartsfield & Co. against Holt, that he died, and Dozier was appointed administrator of his estate; that at February Term, 1856, of the Inferior Court, an order was passed, reciting that *scire facias* having issued and been served upon the administrator, to show cause why he should not be made a party, and no cause being shown, it was ordered that the administrator be made a party defendant, and the cause proceed. And at the same term, judgment was confessed by T. W. & C. T. Goode, attorneys for defendant.

Dozier, the administrator, based his motion to set aside this judgment and the execution issued thereon, upon the grounds that he had never been served with any *scire facias*, and that said confession was made by said attorneys under a misapprehension of the case.

The issue formed upon this motion was transferred to the Superior Court, to be tried on the appeal, and the case being there submitted to a special jury, after the testimony was closed, the presiding Judge charged the jury: "That pending this suit, and before judgment, Holt died; in such case, the administrator cannot be made a party until *scire facias* issues and is served on him; and the issue now before you is, whether the order making Dozier a party defendant to the suit in the Inferior Court, should be vacated and set aside, on the ground that no *scire facias* was issued and served upon him.

"The facts recited in the order making Dozier a party is evidence, and cannot be controverted except for fraud. If the order recites that a *scire facias* was issued and served, these facts are to be taken as true, and it is not competent for this Court to review the evidence upon which that recital was made, except the order be attacked as being obtained by fraud. The order being a judgment of a Court of competent jurisdiction, cannot be impeached except for fraud, and the

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movant cannot attack it on the ground merely that no *scire facias* was in fact issued and served."

There were three other cases in the same condition, and it was agreed that the result of one should settle all.

The jury found for the defendant, and counsel for movant moved for a new trial, on the grounds, that the verdict was against law and evidence, and that the Court erred in its charge to the jury, that the order, with its recital, making movant a party, could not be attacked except for fraud, and that the evidence upon which said order was founded, could not be reviewed unless impeached for fraud.

The Court refused the motion for a new trial, and movant excepted.

O. C. GIBSON ; T. W. & C. T. GOODE, for plaintiff in error.

SMITH, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The Court below charged the jury as follows ; "The facts recited in the order making Dozier a party, is evidence and cannot be controverted, except for fraud. If the order recites, that a *scire facias* was issued and served, these facts are to be taken as true." Was this charge right?

It is no doubt true, that a judgment rendered against a man, by a Court that has jurisdiction to render it, is conclusive against him, if not obtained by fraud. But does a Court have jurisdiction to render judgment against a man who has never had notice, of the suit, and who does not appear to the suit? Most certainly, not.

Can it get this jurisdiction, by falsely reciting, in some proceeding in the suit, that the man was notified of the suit, or that he appeared to it? Nobody will say so.

But we have to say so, in effect, if we say, that such recitals are *conclusive* on the man. This must be manifest.

It follows, then, that we cannot say so.

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"A want of jurisdiction in the Court pronouncing it," (any judgment,) "may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record, has no sort of application to the case." Note 551 to *Phill. on Ev.*, see cases there cited; and see the *Marshalsea's Case*, 10 *Coke*, 76.

We think, then, that a judgment reciting, that a party was served with process, is not *conclusive*, but only *prima facie*, evidence that he was so served. And, therefore, we think, that the charge above quoted, was erroneous. We think, that Dozier had the right to prove, if he could, that the *scire facias* was not served on him, and that no one had authority to appear for him, notwithstanding any recital in the order making him a party.

Of course, we intimate no opinion as to the sufficiency of the evidence introduced by Dozier.

New trial granted.

JOHN M. JACKSON, et al., plaintiffs in error, vs. MALCOM D. JONES, et al., defendants in error.

[1.] The bill, showing that the land, the subject of the suit, is owned by several tenants in common, some of whom are alleged to have made valuable improvements on parts of it, and showing other equities *prima facie*, against the defendants, is not without equity, and to be retained for a hearing.

[2.] The answer displacing a part only of the equity of the bill, is not sufficient for a dissolution of an injunction granted in the cause.

In Equity, from Murray county. **H.** Decided by Judge TRIPPE, February Term, 1858.

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A demurrer was filed for want of equity, to a bill which had been filed by the defendants in error for an injunction. This demurrer was overruled by the Court.

Answers having been filed, the defendants moved the Court to dismiss the bill and dissolve the injunction which had been granted, on the grounds that all the equity in the bill, if any, had been sworn off, and that there was no equity in the bill.

The complainants in the bill alleged, that Elizabeth Clark, of McIntosh county, drew lot of land No. 245, in the 9th district and 3d section, and that a grant to this lot was issued in 1830; that the said Elizabeth Clark, in 1833, sold the lot of land to John F. Williams, who, in the same year, sold it to Robert Young; that Robert Young, in the same year, 1833, sold the said lot to Abner E. Halliday; that in 1834, Halliday sold to Matthew Jones, of Burke county, one-third part of said lot; that Halliday and Jones, in 1834, gave one-fourth of the lot to the Justices of the Inferior Court of Murray county, on condition that the Court House should be built thereon, and gave a power of attorney to Wm. N. Bishop to lay off and convey it to said Court for that purpose; that the said lot originally contained 160 acres; that Jones and Halliday gave each one-fourth of their interest, which left Halliday 80 acres and Jones 40, and Halliday, in his life time, disposed of one-half of his interest, 40 acres, to Wm. N. Bishop, and two town lots were reserved to Halliday and Jones; that in 1837, William McGehee, as Sheriff of Murray county, sold under execution against Wm. N. Bishop, one undivided 40 acres of 120 acres, and that Jacob Shotwell became the purchaser; that James Morris claimed to be the owner of the 40 acres sold as the property of Bishop; that the two town lots reserved in the town of Spring Place were sold and conveyed by Halliday and Jones two years before; that Abner E. Halliday died intestate, and that Matthew Jones obtained letters of administration to his estate, and obtained an order to sell the land, and sold the same at public sale before the Court House

door at Spring Place, on the 1st Tuesday in September, 1837, to Alexander and Jacob Shotwell and Spencer Riley, for \$1,000, in two payments of \$500 each; that the said Jones accounted for and paid over to the heirs the said amount; that the said Halliday left his widow and two daughters his heirs-at-law, and that P. H. Maubrey was, in 1838, appointed guardian of the daughters; that the said Matthew Jones having fully administered the estate of the said Halliday, applied for letters dismissory from such administration, but died intestate before the publication was complete; that Allen Jamerson and Mitchell B. Jones administered on the estate of the said Matthew Jones, and obtained letters dismissory of his estate from his administration on Halliday's estate; that the said Matthew Jones returned the \$1,000 for the land sold, and accounted for it, but that no part of it was ever received by him—Alexander and Jacob Shotwell and Riley proving insolvent—and that the administrators of Matthew Jones rescinded the contract, and gave up the notes, and cancelled the bond; that when the notes were cancelled and the bond given up, the title to the land vested in the heirs-at-law of Matthew Jones, and that even if he had not paid, after the administrators of Jones received the bond back, and gave up the notes, and were discharged from the administration on Halliday's estate, the land vested in equity in the heirs-at-law of Matthew Jones; that Matthew Jones, at the same time that he sold the 40 acres of Halliday's estate, sold his own 40 acres to the same parties, and for the same price; and that this contract was also cancelled at the same time by the administrators of the said Matthew Jones; that the whole 80 acres were turned over to the heirs-at-law of the said Matthew Jones, and that one of them, James M. Jones, died, and Malcolm D. Jones administered on his estate; that after the death of the said James M. Jones, the only persons interested in the said land were Malcolm D. Jones, Francis A. Jones, Mary Jones and Mitchell Jones, and that Mary Jones and Mitchell Jones were minors, and that Malcolm D. Jones was

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appointed their guardian; that the said Jacob Shotwell and Spencer Riley transferred their interests in the said 80 acres of land to Alexander Shotwell, who sold the same to the administrators of Matthew Jones; that Malcolm D. Jones, as such guardian, applied for and obtained an order to sell the interests of Mary and Mitchell Jones in the said land, and that he sold the same; and at the same time the interests of the said Malcolm D. and Francis Jones were also sold; that the said land was sold by them to James Edmondson, for \$2,200, excepting therefrom certain portions in the possession of Bell, Buchanan and Turner; that since the sale Mary Jones had intermarried with Joshua R. Price, and the guardian, M. D. Jones, had settled with him, and paid him his share of the money. That the widow of the said Halliday died, leaving the said Cornelia and Amelia her heirs-at-law; that the said Amelia had intermarried with John M. Jackson of Whitfield county; that the said John M. Jackson, and his wife, Amelia, and Cornelia Halliday, finding that no deed to the part of the land sold to the Shotwells and Riley had been executed by the said Matthew Jones, but knowing that the money for which it was sold had been received by them, had sued the complainants in an action of ejectment, and had laid a demise in the names of Elizabeth Clark and Robert Young, neither of whom had then an interest in the land, and that the said Elizabeth Clark died before the commencement of the action; that the said defendants to that action had confessed judgment and entered an appeal; that although James Morris had been made a defendant in said action, it was only as a matter of form, there being a secret understanding amongst them that the said Morris should lose nothing, but that only that part of the land should be recovered which had been sold to Edmundson; that the Joneses, and those holding under them, were the only persons entitled in equity to hold the land, and before the plaintiffs were entitled to recover the same, they ought to be compelled to pay into Court \$1,000 and interest, for the use of the Joneses; that the plain-

iffs ought not to recover in said action because, after Jones sold the land to Edmundson, he took possession of the same, and not knowing that the said Jackson and his wife Amelia, and Cornelia Halliday, had any claim to the land, had made improvements upon the same to the amount of \$2,000, and that others had made improvements; and that the said plaintiffs should pay said complainant for permanent improvements before recovering said land. The complainants therefore prayed for a discovery and an injunction restraining the said defendants, Jackson and his wife Amelia, and Cornelia Halliday, from prosecuting the said action of ejectment.

An injunction was granted according to the prayer of the bill.

The defendants, John M. Jackson, and his wife Amelia, and the said Cornelia Halliday, by their answers deny that the said Matthew Jones, after obtaining the order to sell the land, ever advertised it according to law, or that he sold it by public sale as charged in the bill, but that it was purchased at private sale. They denied—said defendants Amelia and Cornelia—that, so far as they knew and believed, the said Matthew Jones ever returned the amounts of the notes given for the lands, or accounted for and paid over the same to the heirs and distributees of said estate. They also denied that the said Matthew Jones ever fully administered or did his duty with respect to the estate, but stated that he failed so to do, as he never made any inventory, and that there was certain property disposed of by him, of which he made no, or only partial returns, which property the defendants specified in their answers; and that thus he was indebted to the estate to the amount of sixteen or seventeen hundred dollars. They also denied that Matthew Jones paid over to the said Mary Halliday, or to their guardian for them, their full distributive shares of the estate. The defendants further answered, that the order, if any, dismissing the said Matthew Jones from the

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administration of the estate of the said Halliday, was fraudulently obtained, it having been taken two years after the petition of the said Matthew Jones for dismissal, and without any further application; that if Matthew Jones had lived, the guardian of the said Amelia and Cornelia would have objected to his obtaining such an order; but when Matthew Jones died, it was supposed his application died with him. The defendants denied that there was any legal sale of the land to the Shotwells and Riley, or that the administrators of Matthew Jones had any right to cancel the alleged sale, or to appropriate the said land, as such administrators. The said defendants alleged, that they and the said Mary Halliday were the sole owners of the said 80 acres of land, and not the heirs of the said Matthew Jones. The defendants admitted that they brought the action, confessed judgment, and entered the appeal as charged, but denied that there was any secret understanding with the defendant, James Morris, that if they recovered the land he should lose nothing.

James Morris, by his answer, admitted the facts substantially as stated in the bill, but denied that there was any collusion or secret understanding between himself and the plaintiffs, as to the said action of ejectment.

After argument had upon the motion to dissolve the injunction, the Court refused to dissolve the same, and the respondents' counsel excepted, and assign the same as error.

WALKER, for plaintiffs in error.

AKIN, *contra*.

By the Court.—**MCDONALD**, J. delivering the opinion.

[1.] The land which is the subject of the suit, in the action of ejectment, if the allegations of the bill be true, was held

by several of the parties as tenants in common, and some of them had put expensive improvements on a part of it; it had never been divided, and the complainants ask an injunction of that action. They allege that the improvements were made in good faith. The bill exhibits a very complicated state of things, on the part of the administrator of Halliday and his administrator, the latter carrying out, to say the least of it, most extraordinarily, the application of the former for letters disffissory from his administration. The bill for the protection of the several purchasers of distinct portions of the land in controversy, calls for a settlement of the administration, expecting to show that the persons claiming the land, or a part of it, now, as heirs-at-law of Halliday, have received the proceeds of the sale, and that by that act, and a long acquiescence in what has been done in relation to it, are barred in equity from calling them to account. It is true that the bill does not present a very strong equity in this aspect of the case, yet it may be best to investigate these matters fully.

We think that the Court ought to have overruled the demurrer to the bill, and to have refused the motion to dismiss the bill.

[2.] The answers do not displace the equity of the bill, so far as the rights of the complainants, as tenants in common with the defendants, admitting the title of the latter to be good, are concerned. But they produce strong circumstances to show that the administrator of their deceased father's estate had not fully accounted.

The evidence furnished from the record of his returns, copies of which are made exhibits to the bill, are far from conclusive on that point; nor is the argument that upon the cancellation of the contract of sale made by the administrator on Halliday's estate, the title vested in the estate of the administrator, instead of the estate of Halliday. The equity of this branch of the case must be made out by proof at the hearing. The records are unsatisfactory as to that.

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We think that justice to all parties requires that this cause should undergo a thorough and deliberate investigation, and that the injunction should be retained until that takes place.



Judgment affirmed

EDWARD J. McLERoy, plaintiff in error, vs. ISAAC McLERoy,
defendant in error.

When there is an adequate remedy at law, equity will not interfere.

Equity, from Pike county. Decided by Judge CABINNESS,
October Term, 1857.

Edward J. McLeroy, as guardian of Charles W. McLeroy, (the minor child of James McLeroy and Eliza W. McLeroy, formerly Eliza W. Gilden) filed his bill in equity for an injunction, under the following circumstances: The said Eliza McLeroy, then Eliza Gilden, was, in 1850, possessed of two negroes, which she had received from the estate of her mother, Mary Gilden, under and by virtue of the will of her said mother, the 4th item of which was as follows: "I give and bequeath to my daughter, Eliza W. Gilden, and to the heirs of her body, a negro boy by the name of Demps, about ten years old, also my boy Hanson, eight years old." In 1850 the said Eliza Gilden intermarried with James McLeroy, and in the following year died. The complainant stated these facts in his bill, and alleged that he was informed and believed that in consideration of said marriage, it was agreed by the said James McLeroy, that the said two negroes should continue and remain the property of said Eliza W. in trust for the children of the marriage. That Charles W., the complainant's ward, was the issue of the marriage. That

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the said James McLeroy subsequently intermarried with Mary White, and in 1856, died intestate. That the said Eliza Gilden received the said two negroes not as her absolute property, but to her absolute use only, in the event of her having a child or children, and that the fee in said negroes was to vest in said children; and up to the time of the birth of the said Charles W., they were so considered; and afterwards the said James McLeroy and the said Eliza continued to treat them as the property of the said Charles W.; and that at the time of the second marriage of the said James McLeroy, it was well understood, by the said Mary White, to whom they belonged, and that during the lifetime of the said James, she so treated and spoke of them. That Hanson, one of the said negroes, had died. That letters of administration on the estate of the said James McLeroy had been granted to Isaac McLeroy, and that the said Isaac had taken possession of all the property of the deceased, and at the same time took possession of the said negro Demps, and did, in December, 1856, offer the said negro boy for sale under an order from the Court of Ordinary, as the property of the said James McLeroy. That complainant interposed a claim to the said negro, but not being ready for trial at the Inferior Court, confessed judgment and entered an appeal to the Superior Court, and said appeal was then pending. That under the strict rules of evidence in a Court of common law, complainant would not be able to prove all the aforesaid facts and circumstances, and had not an adequate remedy at common law. Complainant therefore prayed that the said Isaac McLeroy might be ordered to deliver up to him, as guardian, the said negro boy, Demps, and account for his hire from the time complainant demanded the same from him, and for an injunction restraining the said Isaac from trying the said claim cause at law.

Complainant applied to the Judge in the Court below for an injunction, which was refused. And complainant excepted.

GREEN, DANIEL, and DISMUKE, for plaintiff in error.

J. Q. A. ALFORD, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The bill alleges, that it was agreed by and between James McLeroy and Eliza W. Gilden, in contemplation of intermarriage, that she should hold the two negroes for the use of the children of the marriage; that Charles W. McLeroy was the only child of the marriage; and that, Jas. McLeroy, after the marriage and the birth of Charles W., always treated the two negroes as the property of Charles W.

Whatever title to the negro in dispute, this gave to Charles W., may be as well asserted at law, on the trial of the claim, as it can be, in equity. This is plain.

There is no need, then, for the bill, and, therefore, no equity in the bill.

I remark, however, that whether the agreement gave any title to the negro to Charles W. or not, depends, I suppose, upon whether the agreement was in *writing* or not; or, if it was not in writing, upon whether it was *executed, carried out*, or not, by the father, James McLeroy, in his lifetime. Whether his conduct in respect to the negroes, amounted to an *execution, a carrying out*, of the agreement, is another question.

Judgment affirmed.

JOHN A. DOANE, claimant, plaintiff in error, vs. S. B. CHITTENDEN & Co. defendants in error.

- [1.] Where two tenements on the same lot, worth each several thousand dollars, are both levied on and sold together to satisfy a tax execution of less than one hundred dollars, the sale is absolutely null and void.
- [2.] The owner of a city lot mortgages it in 1855; in September, 1856, a tax execution is issued to collect the tax due by the mortgagor, for 1856, and sells, not the equity of redemption, but the whole property, a property worth six or seven thousand dollars, for less than one hundred.

Held, That the lien of the mortgage is not divested by the sale.

Claim, from Fulton. Tried before Judge BULL, at October Term, 1857.

A mortgage *fi. fa.*, bearing date 30th April, 1857, in favor of S. B. Chittenden & Co., against James T. Doane, for nineteen hundred and nine dollars and eighty-four cents, besides interest and costs, was, by the Sheriff of Fulton county, levied upon the property mortgaged. The levy was made 1st May, 1857. The mortgage was executed by James T. Doane to plaintiffs *fi. fa.* on the 15th November, 1855, and recorded 24th November of the same year. A claim to this property was interposed by John A. Doane.

Upon the trial of the claim, the plaintiffs in *fi. fa.* (the mortgagees) offered in evidence the mortgage *fi. fa.* with the entry of the levy by the Sheriff upon the property described in the mortgage, which was "upon part of lot No. 4, in block No. 10, in the city of Atlanta, being part of land lot No. 77, in the 4th district of originally Henry, now Fulton county, fronting on Whitehall street 50 feet, and on Hunter street 140 feet 5 inches."

The plaintiff in *fi. fa.* further proved by the Sheriff, who made the levy, that James T. Doane, the mortgagor, was in possession of the property at the date of the mortgage. Here plaintiff closed.

The claimant then offered in evidence the copy of a tax *fi.*

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fa. (the loss of the original having been proved) in favor of the City of Atlanta, against James T. Doane, for taxes due by him to said city for the year 1856, dated 1st September, 1856, with the following entries endorsed thereon:

"Levied the within *fi. fa.* on part of city lot No. 4, block No. 10, lying on Whitehall and Hunter streets, including the house lately occupied by John A. Doane, and the one at present occupied by Andrews & Miller, being part of lot No. 77, originally Henry, now Fulton county. This Oct. 28th, 1856.

B. N. WILLIFORD, Marshal."

"December 1st, 1856. The parcel of land, &c., levied on by virtue of this *fi. fa.* was this day sold by me to John A. Doane for \$99 50, which I have applied in full satisfaction of this *fi. fa.*

B. N. WILLIFORD, Marshal."

"GEORGIA, } I, W. R. Venable, Clerk of the Superior
Fulton county. } Court of said county, do hereby certify that
the within *fi. fa.*, with the entries thereon, is a true copy of
the original now of record in my office. Given under my
hand and official signature, this 3d December, 1856.

W. R. VENABLE, Clerk."

Claimant then offered and read in evidence a deed from Williford, the Marshal, to him, dated 3d December, 1856, conveying said lot, in pursuance of said sale. This deed was recorded 3d December, 1856, the day of its date.

Claimant then introduced B. N. Williford, who testified, that as Marshal, he levied said tax execution on said lot, 28th Oct., 1856, and sold the same to John A. Doane, for \$99 50, he being, at that price, the highest bidder. Said sale was made on the 1st Monday in December, 1856. That as the entire lot consisted only of one-fourth of an acre, and covered with houses, one occupied by defendant as a store below and dwelling above, the other by Andrews & Miller, which were connected by a flight of stairs, and a floor at the head,

with doors opening into each house, and by a roof extending from one to the other—he offered the whole for sale at once, considering the lot incapable of convenient division. Both houses were not under the same roof.

Claimant further proved that the store house was worth \$4000 or \$5000, and the annual rent about \$300 or \$400. And the house occupied by Andrews & Miller about \$2000, rent about \$150 or \$200.

Upon this testimony the presiding Judge charged the jury, that it was illegal to sell the whole property together, if the two houses were separate tenements, and one could be sold without interfering with the occupancy of the other, and that the fact of one pair of stairs running between the buildings, affording a common entrance into the upper story of each building made no difference. And that if the whole property was sold together to satisfy so small a *fi. fa.*, when a part could have been conveniently sold, the sale was void as against creditors.

His Honor further charged, that the claim or lien of the city for taxes for 1856, was superior to and had priority over any mortgage executed by, or any judgment recovered against, defendant during that year. But a mortgage executed by him, prior to that year, had priority of taxes due in and for 1856, and if they believed that the mortgage was executed by defendant previous to the year 1856, then they should find the property subject, and the sale by the marshal, even for taxes, passed no title to the purchaser, beyond the mortgagor's equity of redemption.

There was no evidence that any portion of the tax *fi. fa.* against Doane, was for taxes due on the property mortgaged.

To which charge claimant excepted.

The jury found the property subject to the mortgage *fi. fa.*

Whereupon counsel for claimant tender their bill of exceptions, and assign as error the charges above given.

J. M. & W. L. CALHOUN, EZZARD & COLLIER, and B. H. HILL, for plaintiff in error.

T. L. COOPER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Was the Court right in ruling in this case, that the sale was void on account of its excessiveness?

We think so most clearly. Here were two tenements actually occupied by different persons, and erected for that purpose, having no necessary connection with each other, and each of which is proven to have been worth thousands of dollars, both offered for sale together to satisfy a tax *fi. fa.* of less than one hundred dollars.

By the Tax Act of 1804, no more property could be sold than was necessary to satisfy the tax *fi. fa.* and cost. If two lots of land were sold together, the sale was void; and parcels of the same tract had to be separately offered until a sufficient sum was raised to pay the amount. And to the same effect is the 14th Sec. of the charter of the city of Atlanta. (*Pamph. of Charter and Ordinances*, p. 9.) Under such enactments, which are reasonable and right, how can a sale be justified of the character of this?

But it is argued that the Marshal is the sole judge of this matter; and that his Honor Judge Bull, had no right to instruct the jury that the facts in this case did not justify the judgment of that officer.

We dissent wholly from this position. True the levying officer must judge, but still he must be guided and governed by the law as Courts are in the exercise of their discretion, and if his discretion be grossly abused, as the facts testified to by himself show it was in this case, it must be controlled and his acts set aside by those having paramount and ultimate authority to decide in this matter.

Was the Court further right, in holding that the tax lien

in this case did not override the mortgage lien? We concur fully with the Circuit Judge that it did not.

The city charter declares that the tax execution shall only bind the property of the defendant from the date thereof. (*Pamphlet of Act of Incorporation and Ordinances, p. 9.*) Here the mortgage lien was created in the Fall of 1855; the tax was for the year 1856; property was given in, in April, 1856; and the execution is dated September, 1856.

We concur with the learned counsel for the plaintiff in error, that all property liable to be taxed shall pay taxes; and we further concur with him, that in order to ascertain who is liable we must look to the person who owns the title; and we concede further, that the title in this case was in the mortgagor, until it should be divested by foreclosure and sale. He can ask no further admissions. What then was the law applicable to the facts of the case? The tax was assessed on this city property. The execution to enforce its payment issued against the mortgagor. All this was right. He had not parted with the title. Nor had he been divested of it by judicial sale. But what then? Herein consists the fallacy of the whole argument. In 1855, before this tax accrued, the owner had created a mortgage lien on the lot. It could only be sold then subject to this lien, or as we usually say, whether technically accurate under our laws or not, it makes no difference, and means practically precisely the same thing, the equity of redemption only could be sold; and if in this way, the amount due could not be raised, the mortgagee under the act of 1804, was liable for and could be forced to pay the balance. All this whole doctrine free from any perplexity, will be found in the 15th Sec. of that act. *Cobb, 1050.* It says, "All deeds of gift, conveyances, mortgages, sales and assignments of goods, lands, tenements, and chattels of any kind of any person whatsoever, made with an intention to avoid paying the aforesaid taxes, are hereby deemed and declared null and void; and in case any person who has mortgaged estate, real or personal, shall neglect or refuse to pay

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the tax for the same, the mortgagee shall be liable to pay the same. Provided that no such sale for taxes, under this act, shall tend to affect the State's title to any property mortgaged or secured thereto."

The proviso, of course, has nothing to do with the subject. I thought it best however to quote the entire section.

Is it not obvious that the owner of property, real or personal, may *bona fide* sell, mortgage or give his estate, before the lien of the State attaches thereon? and what difference can it make to the State, whether the grantor or grantee, the donor or donee, the mortgagor or mortgagee, pays the tax? It is all the same to the public. It is manifest, that whatever confusion exists upon this subject, there is none in the law itself. It is harmonious and just.

The error in this matter consists in having sold the whole property, when the equity of redemption, or the property subject to the mortgage incumbrance, was all, that could have been sold under the tax execution against James T. Doane, and that, as the testimony shows, was sufficient to have paid the debt many times over. What connection there is between James T. Doane, the mortgagor, and John A. Doane, the purchaser of this valuable property, and claimant in this case, the record does not disclose.

That the public revenue must be collected, all agree. But the power to collect taxes, even in favor of the sovereign State, much less these municipal corporations, is not so omnipotent as counsel imagines. The authority of the government is always tempered with wisdom and justice, as well as mercy. Hence the provision in the Act of 1840, (*Cobb*, 1072,) giving to the citizen the right to claim property not subject to a tax collector's execution.

I have discussed this question as though the grant of power to this corporation to levy and collect taxes, elevated it to an equality of right with the State itself. I am very far, however, from entertaining such an opinion. On the contrary, I hold that they are amenable to the law for the abuse

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of their power; and subject to judicial control, the same as individuals, except where exceptions and immunities have been conferred by the sovereign power that brought them into being.

Judgment affirmed.

ELIZABETH SANDERS, caveator, &c., plaintiff in error, vs. B. F. WARD, et al. propounders, &c., defendants in error.

A will directing the executor, after the payment of the debts of the testator, which were small, and the estate, independent of the negro property, ample to discharge them, to remove the testator's slaves to some free State, to be selected by the executor, and there to set them free, is not contrary to the laws of this State, nor within the Acts of 1801 and 1818, prohibiting manumission in this State, except by the sanction of the Legislature.

Manumission of slaves by will, from Monroe county. Decided by Judge CABINNESS, August Term, 1857.

Nathaniel T. Myrick, of Monroe county, on the 21st of June, 1856, executed his last will and testament; and after direction to his executors to pay his debts and funeral expenses, proceeded in the 2d and 3d items as follows:

"Item Second: I devise and bequeath, and require my executors hereinafter named, to remove my servants Owen, Elizabeth, Joseph, Samuel, William, Flora, George, Harriett and Leonard, to some free State, as my executors may choose and select, as they may deem proper, then and there to manumit and set them, my said named servants, free, to act for themselves, them and their heirs forever.

Item Third: My executors hereinafter named shall purchase in such free State as they may select, a parcel of land sufficient for the above named servants, with a supply of pro-

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visions, household and kitchen furniture, farming utensils, horses or mules, cattle, hogs and sheep, with the money arising from the sale of my estate, as above directed, and shall pay over any surplus after paying for the removal aforesaid, land and other articles mentioned, to my servant Owen, to be manumitted aforesaid, each one to have and own an equal portion of said land and other articles to be purchased as aforesaid, and also an equal portion of the money remaining after the removal and settlement aforesaid."

To the probate of this will a caveat was entered by Elizabeth Sanders.

At the trial upon the appeal, the propounder of the will introduced in evidence the said will. To the admission of this paper in evidence the caveators objected on the ground, that all the witnesses to the said will had not been examined, nor had the failure to examine them been accounted for; and that the said paper so offered was illegal and in violation of the Statutes of the State against the manumission of slaves. The Court overruling the objection, admitted the will in evidence, and the caveator excepted.

The jury found for the will, and the caveator, by her counsel, moved the Court for a new trial on the following grounds

1st. Because the Court erred in allowing the will to be read to the jury, before all the witnesses to it had been examined by the propounders, and before they had shown any reason why all the witnesses were not examined.

2d. Because the Court erred in allowing the paper to be read in evidence to the Jury, it being illegal and in violation of the laws of this State against the manumission of slaves, and against the public policy of this State.

3d. Because the Court erred in rejecting the evidence of Vincent T. Lassiter, who testified, that on the evening the testator made his will, on account of signs of stupor and weakness exhibited by testator, he remarked in presence of some of the negroes, that the testator never would make a will.

4th. Because the verdict of the jury is against the law and the evidence.

The Court refused to grant a new trial, and caveator excepted, and filed her bill of exceptions, assigning as error all the grounds taken in the motion for a new trial.

GIBSON ; and HAMMOND, for plaintiff in error.

PINCKARD ; and STEPHENS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

In the matter of Nathaniel T. Myrick's testament, we have examined the will, and find there is nothing in it to bring it within any of the exceptional cases decided by this Court ; and that the naked question presented for our adjudication is, whether, by the laws of this State, a testator can direct his executor to remove his slaves, after his death, to some free State, for the purpose of acquiring their freedom by the operation of the *lex loci*, and make provision for them in their new home? Is this forbidden by the Acts of 1801 and 1818?

In support of my opinion in favor of the negative of this proposition, I simply refer to the past decisions of this Court. I will not re-argue a point so often and so elaborately discussed.

My brother Benning refers to three positions occupied by him in the *Bledsoe Will Case*, and which he insists have never been answered, nor attempted to be answered, and which he deems impregnable.

The first is, that this case comes clearly within the words of the law ; secondly, that the policy of preventing domestic emancipation is best and most effectually subverted by prohibiting all emancipation whatsoever ; and thirdly, that there can be no *exterior* which is not necessarily preceded by *domestic* emancipation.

All three of these positions have been incidentally, if not formally, again and again considered by this Court, and we

had supposed the argument pretty well exhausted upon each. I propose, however, briefly to notice each of them in their order.

1. That clauses can be found in one or both of the Acts referred to, broad enough, *perhaps*, to embrace foreign as well as domestic manumission, may be conceded; but taking the whole of each Act separately, or both together, I demur to the proposition, that extra-territorial emancipation is included in the words of either of these Acts.

What was the object of the Act of 1801? Its title discloses. It was an "Act prescribing the mode of manumitting slaves *in this State!*" *Cobb*, 983. Here, then, we meet with a stumbling block upon the very threshold of the discussion.

Instead of being an Act to prohibit manumission, partial or total, at home or abroad, it is simply an "Act prescribing the mode in which" it shall be done "*in this State!*" And right here arises a dilemma. The title of the Act, specifying as it does, that it was passed to prescribe the mode of freeing negroes *in this State*, and for no other purpose, if it contains any matter different from this, that is, the matter contended for on the other side, namely, a prohibition against foreign emancipation, it is unconstitutional and void. *XVIIth sec. 1 Art. Cons. St. Ga. Cobb*, 1114.

But the Act is valid. Read it in the light of its title, and to its title it must be restricted; and the foundation upon which my brother's first position rests, so far as this Act is concerned, is entirely swept away.

I have said there is no repugnancy between the title and the body of this Act. The first section declares that slaves can only be manumitted by the Legislature. I ask, can it be doubted that any master in the State, notwithstanding this section, has the right to remove to New York, or any other free State, and take his slaves with him, and thus by operation of law, secure to them their freedom? No one has ever expressed or intimated such an opinion. The first section,

then, does not forbid foreign emancipation by the master in his lifetime.

The second section provides a penalty for a breach of the Act, and amongst other things declares, that any slave set free, contrary to the meaning of the Act, shall still be, to all intents and purposes, in a state of slavery. Did the Legislature of 1801 design to render themselves ridiculous, by the promulgation of a *brutum fulmen*, that slaves set free by their removal to a free State, should still be in a state of slavery? Such an imputation would be disrespectful to that body.

The third and last section makes it penal for officers to record any deed, or other instrument, which shall have for its object the manumitting or setting free any slave. As no deed was necessary to confer freedom on slaves, by transferring them to a free State, foreign emancipation could, of course, be effected by the master in his lifetime, without incurring the penalties of this Act. *Wills* are not designated in this section by name, still, the words are broad enough to include them; and it is in accordance with the whole object of the Act to construe it to apply to wills. And if no will can be recorded which confers freedom abroad, there can, of course, be no such thing, for the will gives no authority to the executor to act, until proven and admitted to record by the proper tribunal. But this section must be construed in reference to the rest of the Act; for it is one of the means provided for its observance. The language of this section must be limited to the purpose for which the law was passed; and that, as we have seen, was to prescribe the mode of manumitting slaves in this State, which is by the Legislature, and to make it penal to do it in any other way.

So much then, for the present, for the Act of 1801. We shall have occasion to advert to it again before closing these remarks.

The Act of 1818 was an "Act supplementary to, and more effectually to enforce the Act of 1801." *Cobb*, 989.

We have seen, that by the third section of the Act of 1801,

no *instrument* could be recorded which gave freedom to slaves in *this State*; and it was very naturally interpreted to extend to the whole deed or will. But in the second section of the Act of 1818, it is declared that the third section of the Act of 1801 shall be construed to extend to inhibit the recording only *so much* of any instrument as relates to manumission. Here, then, is a legislative declaration against too latitudinarily a construction of the language in the third section of the Act of 1801.

And yet it would seem that to make the whole instrument void, would have been a very efficacious mode of preventing a violation of the Act. But suppose the Courts of the State had construed the third section of that Act to inhibit foreign emancipation, when the fell demon—abolitionism—had not reared its monster head to menace the land, and when six years after, as their resolution shows, the Legislature had not abandoned the idea of prospective and ultimate emancipation, and when they were passing resolutions laudatory of the American Colonization Society, who doubts that the General Assembly, at that day, would promptly have negatived any such interpretation of the Act of 1801, as is sought now, for the first time, to be put upon it? No; it is a modern thought, obviously and unquestionably suggested by the state and change of the times, and not by the Act itself.

The Act of 1818 was intended to accomplish a two-fold purpose; to extend the Act of 1801, and to prevent evasions of it, by what may be denominated fraudulent manumission. That is, by allowing persons of color the full exercise and enjoyment of all the rights of free persons, and yet who never have been manumitted in conformity to law, and without being subject to the duties and obligations incident to such persons. Against this state of things the Act of 1818 is partly directed.

The preamble to the Act recites, that "Whereas the principles of sound policy, considered in reference to the free citizens of this State, and the exercise of humanity towards the

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slave population within the same, imperiously require that the number of free persons of color within this State, should not be increased by manumission, or by the admission of such persons from other States to reside therein : And whereas, divers persons of color, who are slaves by the laws of this State, having never been manumitted in conformity to the same, are nevertheless in the full exercise and enjoyment of all the rights and privileges of free persons of color, without being subject to the duties and obligations incident to such persons, thereby constituting a class of people, equally dangerous to the safety of the free citizens of this State, and destructive of the comfort and happiness of the slave population thereof, which it is the duty of this Legislature, by all just and lawful means, to suppress."

Here, again, as in the title to the act of 1801, we are impressed with the one single definite object in contemplation of the Legislature, namely the evils of domestic manumission, actual and colorable, and the mode of preventing it. Not only is this one thought uppermost in their mind, but none other seems ever to have entered their imagination, or been even conceived of. My brother says he has no prejudice against free negroes, and thinks they constitute a very convenient class of our population. And he is not singular in this opinion. But we are sitting here merely to expound and enforce the legislative will, and not our own. And there can be no contrariety of conclusion in reading these acts, that the Legislature entertained a very different view of the matter. They looked upon free negroes in our midst as a great nuisance, and were determined by the most stringent enactments to prevent the increase or multiplication of this mischief.

While this idea is put forth so prominently, throughout these statutes, it is equally remarkable that no allusion is made in any one line, or word, or syllable, in either of these Acts, to foreign emancipation ; and yet, after a universal acquiescence of the people of the State, for more than a quarter of a

century, as to the true and only meaning of these Acts, it is now discovered for the first time, that they contain a prohibition against extra-territorial emancipation! This difference of opinion, upon a point which appears to me too plain and palpable to admit of doubt, has done much to humble my pride of opinion, and to teach me patience, even when men deny the existence of matter; that man can hold property in man; contend for the immaculate conception of the Virgin Mother; or any other philosophical, political or religious dogma.

In the first clause of the 4th section of the Act of 1818, we find broader terms used than in the 3d section of the Act of 1801. In the latter it is merely declared unlawful for the Clerks of the Superior Courts, or any other officers of the State, to enter on record, in any book of record kept by them, any deed of manumission or other paper which shall have for its object the manumitting or setting free of any slave or slaves; whereas, in the first clause of this 4th section of the Act of 1818, it is declared that all and every will and testament, deed, whether by way of trust or otherwise, contract, agreement or stipulation, or other instrument in writing, or by parol, made and executed for the purpose of effecting or endeavoring to effect the manumission of any slave or slaves, either directly, by conferring or attempting to confer freedom on such slave or slaves; indirectly or virtually, by allowing and securing, or attempting to allow and secure, to such slave or slaves, the right or privilege of working for his, her, or themselves, free from the control of the master or owner of such slave or slaves, or of enjoying the profits of his, her, or their labor or skill, shall be, and the same are hereby declared to be utterly null and void.

It will not be disputed, that if you take this part of the section only, the words of the Act are broad enough to cover the will before us, and all others conferring freedom, whether foreign or domestic. But the fallacy of the proposition which I am endeavoring to combat, consists in its being based

upon one clause of the statute. Is it legitimate to do this? To take one clause, or even section of a statute, one item of a will, or any other instrument, and construe it apart from the context? Such a mode of interpretation is inadmissible. You must construe every contract, constitution, and every other instrument, as a whole. It was the *fool* that said in his heart, "There is no God." And yet leave out the context, the first part of the first verse of the 14th chapter of Psalms, and you can prove by the Bible itself, "there is no God."

And this is the rule of common law as well as of common sense. "The intent of the Legislature," said C. J. Best, "is not to be collected from any particular expression, but from a general view of the *whole* of an Act of Parliament." 4 *Bing. R.* 196.

Before reaching the end of the 4th section of the Act of 1818, beginning with the general terms which I have quoted, we find a provision, that the slaves attempted to be freed, in contravention of the terms of that Act, are made liable to be arrested by warrant, and sold as slaves at public outcry. The Legislature had in contemplation, of course, slaves remaining as freemen, or *quasi* free, in the State. But when we reach the 10th section of the Act, all doubt vanishes as to the meaning of the Act. It requires Courts of Justice to construe the Act of 1818 according to the true intent thereof, "*as declared in the preamble,*" and not according to our present notions of policy, resulting from our angry collisions with the North, respecting this institution. That is to say, the Courts of Georgia are to give to this Act such an interpretation as will prevent the increase of free persons of color within this State, either by manumission, open or colorable, or the admission of such persons from abroad.

Taking the whole of either of these Acts, then, or both together, I do insist most earnestly, that foreign emancipation is neither within the letter or spirit of the law.

And when we look to cotemporaneous history, the evidence

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is overwhelming, that no such meaning was intended. Had the entire State been polled in 1818, ten men would not have been found opposed to foreign manumission. Wm. H. Crawford, who decided on his circuit, and afterwards in convention of the Judges, in the *Bradley Will Case*, that emancipation in Liberia was not forbidden by the Acts of 1801 and 1818, was a practicing and prominent lawyer, and if I mistake not, a member of the Legislature in 1801. He was familiar with the condition of things and of public opinion at that period, and he and his compeers repudiated the forced construction now attempted, for the first time, to be put upon the Acts of 1801 and 1818. The North and South had not been arrayed at that period in hostile antagonism to each other, touching African slavery. If this change of circumstances demands a new policy to be introduced—and for myself I think it does—let it, as I have said and written again and again, be inaugurated by the Legislature, and not by the Courts.

All writers on law, national and municipal, hold the same language, that the great aim should be to discover what the law-maker meant; never to lose sight of that object, and to give it effect, whatever may be our opinion of its wisdom or policy. "Whatever doubts I may have in my own breast," said Lord Mansfield, in the case of *Pray vs. Edie*, 1 T. R. 313, "with respect to the policy and expediency of this law, yet, as long as it continues in force, I am bound to see it executed according to its meaning." And so say I with respect to the Acts of 1801 and 1818.

I dismiss this head of the discussion with this remark, that looking to the title of the Act of 1801, and the preamble and other section of the Act of 1818, as well as the entire Acts themselves, no one can mistake the design of the Legislature in passing these Acts.

2. My brother Benning's second position is, that if it be the policy of the State to prohibit domestic manumission, it is best subserved by forbidding all emancipation; inasmuch

as some of the slaves sent abroad, occasionally get back. And it is probably true, that some half dozen or less, liberated abroad, have returned to the State. But in all candor, is it allowable to put such a construction upon the Acts of 1801 and 1818, or to cut off the right so highly prized by a large portion, *if not a majority* of our people, to guard against the return of a few straggling negroes? And that, too, when the Act of 1818 itself contains the most ample and stringent provision against free persons of color coming into the State; inflicting a penalty of \$100, to be renewed every twenty days while they remain, and subjecting them to be sold as slaves if the fine is not paid? Can any thing more be needed? Can the Legislature be supposed to have looked to any other means as a protection against this evil?

I have said that it is by no means certain that a majority of our people are in favor of depriving themselves of the right of sending their slaves abroad, to be liberated at their death. The decision on *Bradley's Will* was made and published in the newspapers of the day, at the seat of government, during the session of the Legislature, some quarter of a century since. Its legality has been repeatedly sustained by Circuit Judges, as well as by this Court ever since its organization. No other decision has been so widely circulated and universally known. It has been acted upon by testators throughout the State, again and again. During the session of the Legislature before the last, I addressed a communication to the eminent counsel who argues so earnestly against the validity of this will, and who was at that time chairman of the Senate's Judiciary Committee, calling his attention to this subject, and suggesting the propriety of passing a law forbidding all *post mortem* manumission. Were I a legislator, I should vote for such a bill. So many unforeseen obstacles arise, that it is far better that the master should, during his lifetime, consummate his scheme as to the future disposition of his slaves. From some cause or other, my friend took no action upon the matter. I have been informed by a distinguished Rep-

representative of the House, that a bill was introduced in the other branch of the General Assembly, and *voted down by an overwhelming majority of that body*. I have not consulted the journals, but take it for granted the statement is true. Is it for the Courts, then, to inaugurate this new policy, or to be forever importuned and harrassed with this subject, at each change of incumbents upon this Bench? I trust the question will be considered as settled, until the Legislature see fit to intervene. Let that body speak, and no one will take more pleasure than myself in obeying their behest. Sworn as I am, not to make but to administer the law, I never can torture the law, as it now stands, to a purpose for which *I know* it never was intended.

3. The third and last ground is, that there can be no *exterior* emancipation which is not preceded by domestic emancipation.

On the contrary, the very act of directing slaves to be carried out of the State, presupposes that the dominion of the owner continues. As freemen, they could not be removed. They can only be forced out of the State as slaves. In making wills of this kind, testators need not say a word about bestowing freedom upon their slaves. They have only to direct their executors to send or carry their slaves to some free State, without even calling it such, and there make such provision for them as they may see fit. And their slaves acquire their freedom by operation of the *lex loci*, and not by the will of the testator. They can acquire it in no other way. And their bonds remain until removed by the law of their residence. If I direct my slaves to be carried to New York, there to remain, they are slaves until they reach the free State, and they then become free; not by virtue of my will, but by the laws of New York. The third proposition is utterly untenable.

Again, suppose a testator bequeaths his slaves to Stephen A. Douglass of Illinois, or Rufus Choate of Massachusetts, and says no more; does not the bondage of these slaves con-

tinue until they set foot on the soil of their new home? And yet do they not acquire their freedom *eo instanti* they pass the boundary line of these free States *animo remanendi*? Are they freemen in Georgia? Does exterior manumission depend upon domestic emancipation as a condition precedent to its taking effect in this case? Could not these legacies be recovered in any of our Courts? And yet, a gift of the slaves to the executor, to be removed to Illinois or Massachusetts stands upon the same footing precisely. It is needless to extend this argument; the doctrine cannot be maintained.

But it is argued that the will of the testator cannot be authoritatively enforced, inasmuch as slaves, as such, cannot sue to have the will executed. Concede this to be true, it does not negative the right. A trust may be valid, and yet the trustee neglect or refuse to execute it. It is an old and exploded dogma, that there can be no right without a remedy. It is a confusion of ideas so to hold. A person is employed by the government to erect a State House; has he not a right to be paid? still he cannot coerce payment.

This suggestion has been urged again and again, in connection with the point under consideration, in all the slave States—in Alabama, Mississippi, South Carolina, Virginia, as our past decisions show—and has been invariably overruled. Trustees are selected by the testator, on account of the confidence reposed in them, and usually they will discharge their duty. And if there be doubts, they will apply to the Courts for direction. However faithless we may be to the living, we are rarely so to the dead. If the heirs move in the matter, this will give the Courts jurisdiction, and they will compel by their decree an execution of the trust. How many trusts of this sort all over the slave States, and in this State, have been executed? Have any failed for want of fidelity in the trustee? This objection is imaginary.

It has been triumphantly asked, not by my brother Benning, that if the Legislature were to re-enact the statute of

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1801, without more or less, and this were *res integra*, could there be any doubt that it would be held to exclude every species of manumission? "An act prescribing the mode of manumitting slaves *in this State!*" For myself I am ready for the question. And I do not hesitate to declare that I should construe it just as I now do; and as all other Judges have done, from its first passage. Otherwise I should feel bound for the reasons already assigned, to pronounce the act unconstitutional.

The act, in conformity with its title, declares that it shall not be lawful to set free a slave in this State in any other manner than by an application to the Legislature for that purpose, and then provides the means for enforcing obedience to its provisions.

Of course all applications to free negroes at home must be made to the Legislature; for so the act prescribes; and it is all it does do. It is not pretended that it interferes with the right of a citizen, while living, to emigrate with his slaves, whenever he sees fit. Any attempt to abridge this right would produce revolution and depopulate the State. The attempt will never be made to control the right of expatriation, locally or nationally. These two propositions then not being debatable, can it be seriously contended that in order for a master to send his slaves abroad, that they may become free, it is necessary, under the act of 1801, to receive the previous sanction of the Legislature! The right to make a will accrues at seventeen, in males, and lasts till death, whether that event happen sooner or later. During this interval great changes take place in one's plans and purposes, condition and circumstances. At one time single, at another, with a family; at one period of life rich, at another, poor; and yet under these ever shifting circumstances, the owner of slaves must, in anticipation of a scheme not, perhaps, fully formed in his own mind, apply to the Legislature for leave to send his negroes out of the State, to the North, or Northwest, or Africa, Mexico—a *much better country* for them than any other free

State—at his death! Most wills too are made *in extremis*. It is the last act that most men do. It is postponed with most persons as long as possible. And yet knowing that it is appointed unto all men once to die, and the event, although certain to happen, yet contingent as to time and place, the people must crowd the Halls and time of the Legislature with discussions as to the propriety of allowing A. B. & C. to send off their slaves at their death! And even then, in addition to the public agitation of the subject, the slaves, under such an act, might in many instances, remain in our midst for half a century before the will would take effect by the death of the testator!

It is needless to multiply difficulties. The act of 1801, whatever else it may mean, was never intended to require the previous sanction of the Legislature to the foreign manumission by will, of slaves. The truth is, the Acts of 1801 and 1818, mean just what the Courts have heretofore uniformly held they did mean, and nothing more nor less, and that is, to forbid the setting free *negroes in the State*, directly or indirectly, actually or secretly, without the permission of the Legislature. Leaving slave holders to remove them during their lifetime, or to direct it to be done by their executors, after their death, just as they could before, from the colonization of the Province in 1732, down to that date.

My brother Benning says, that if the question admits of the least doubt he would yield to the unbroken current and concurrence of authority upon this point. But that if all the Courts in the State had declared, and were still to rule, that a creditor could collect 20 per cent. interest from his debtor, when the statute declared he should only be entitled to 7 per cent., and that all beyond this was usurious and void, it could not make it the law, nor would it be obligatory upon him.

I submit to the sober second thought of my brother, whether this illustration be fair? Whether it can be imputed to the men who decided the *Bradley Will case*, Crawford, Law, Holt, Lamar, Dougherty, Strong, Thomas, Warren, Hooper

and Warner, could have been so stupid, as to have missed the mark in a matter so plain? Whether all the Judges in the State have followed blindly these blind guides? Whether Sharkey, of Mississippi, Chilton, of Alabama, and their illustrious associates, have stumbled upon a proposition so plain, that the fool and way-farer could not err therein? Whether these and all the great Judges of all the other slave States, in construing statutes, not only similar to our own, but some of them, as was shown by this Court in *Cleland et al. vs. Waters*, (19 Ga. Rep. 35,) couched in terms much broader than ours, could have erred so grossly and egregiously in a matter so self-evident as that 7 per cent. did not mean 20 per cent.?

For myself, I repeat, I have no partiality for foreign any more than domestic manumission. I believe that policy, as well as humanity for the negro, forbid both. Especially do I object to the colonization of our negroes upon our north-western frontier. They facilitate the escape of our fugitive slaves. In case of civil war, they would become an element of strength to the enemy, as well as of annoyance to ourselves. But what of all this? Shall I therefore undertake, by my individual opinion, to dictate to more than a half a million of my fellow-citizens, what shall be the law, by wresting these ancient statutes from what I believe to be their true and only meaning? A construction adhered to without variableness or a shadow of turning for a quarter of a century? Such is not my understanding of my duty or privilege.

Forbearing, as I have done, to re-argue the main question for the reasons stated at the outset, I am content, for the present, with these few observations, upon the points made by my esteemed colleague, in dissenting from the judgment of the Court in this case. I do not flatter myself to believe that he will consider it an answer to his three propositions. He cannot say, at any rate, that no *attempt* has been made to answer them.

McDONALD, J. concurring.

The only matter of difficulty with the Court grows out of the emancipation clause in the will. The testator requires his executors to remove certain named slaves to some free State and there to manumit and set them free. They are not freed by the will except through the instrumentality of the executors. They cannot, by the will, enjoy freedom for a single moment in this State, and this Court availing itself of the great power of all Courts to construe statutes according to their supposed reason and spirit, has held repeatedly, that extra-territorial emancipation is not prohibited by the acts of 1801 and 1818. I am free to say that if the question were before the Court for the first time, I should be strongly inclined to hold, that, by the act of 1801 on this subject, the Legislature intended to make itself the judge, in every case, whether the desired emancipation, be it intra-territorial or extra-territorial, contravened the existing policy of the State. I do not think that the act of 1818 changes, in the slightest degree, the provisions of the act of 1801 in that respect. Prior to the act of 1818 there had been evasions of the act of 1801, which it was the object of that act to prevent. I yield my own strong impressions to the contrary, to the repeated adjudications of this Court, conceding that there are good reasons for the decisions which have been made.

BENNING, J. dissenting.

The second item of the will is as follows: "I desire, and bequeath, and require my executors hereinafter named, to remove my servants, Owen, Elizabeth, Joseph, Samuel, William, Flora, George, Harriet, and Leonard, to some free State, as my executors may choose and select, as they may deem proper, then and there to manumit and set them, my said named servants, free, to act for themselves, them, and their heirs, forever."

All the rest of the will, with slight exception, is subservient to the purpose intended by this item.

Is this will void? That is the question.

In my opinion, the will, with the exception aforesaid, is void.

The reasons which I have for this opinion, were fully expressed by me, in *Adams vs. Bass*, (18 Ga. 147,) and in *Cleland vs. Waters*, (19 Ga. 65.) Those reasons have been in print for some time; during that time, similar cases represented by lawyers of the first ability, have been before this Court, yet, I have heard nothing which ought, as I think, to shake my confidence in those reasons.

Those reasons consisted chiefly in three propositions with what was offered to prove them. These propositions with this offered proof, I will briefly re-state, and then, I will notice what I have heard in answer to them.

1. The *letter* of the act of 1818, relating to manumission, declares every such will as this, void.

The words of the act are, "All and every will and testament, deed, whether by way of trust or otherwise, contract, agreement, or stipulation, or other instrument in writing, or by parol, made or executed for the purpose of effecting or endeavoring to effect, the manumission of any slave or slaves, either directly, by conferring, or attempting to confer, freedom on such slave or slaves, indirectly or virtually, by allowing and securing, or attempting to allow and secure, to such slave or slaves, the right or privilege of working for his, her or themselves, free from the control of the master or owner of such slave, or slaves, or of enjoying the profits of his, her, or their labor or skill, shall be and the same are hereby declared to be utterly null and void." *Cobb Dig.* 991.

A will "for the purpose of effecting" "manumission" out of the State, is a will "for the purpose of effecting" "manumission." And the *letter* of the act is, that "all and every will" "made" "for the purpose" "of effecting" "the manu-

mission of any slave, or slaves," "shall be" "utterly null and void." Therefore, the *letter*, declares this will, to be utterly null and void.

This is the first of the three propositions, with the proof.

2. To follow the *letter* of the statute, and hold such a will as this, void, is the best possible way of accomplishing the *spirit* of the statute.

Admit the spirit of the statute to be, to prevent the increase of free persons of color in the State.

Now a will has either to be held, void, or it has to be held, valid, one or the other. Therefore, if to hold such a will as this, void, is a better way, to prevent the increase of free persons of color in the State, than to hold it valid, is, then to hold it, void, must be the best possible way of accomplishing the *spirit* of the statute.

A way that is sure to accomplish an object, is a better way of accomplishing the object, than a way that is not sure to accomplish the object.

To hold such a will as this, void, is a sure way to prevent it from increasing the number of free persons of color in the State; to hold it, valid, is not a sure way to prevent it from increasing their number in the State.

To hold it void is to say, that the negroes it would manumit, remain slaves still and go to the heirs of the testator, persons who, it is manifest from their caveat, will, if they get the negroes, be desirous of keeping them in slavery. And it is impossible, that slaves can become free persons, if their owners desire to keep them slaves. "The Legislature shall have no power to pass laws for the emancipation of slaves, without the consent of each of their respective owners, previous to such emancipation." *Art. 4, Sec. 9, Cons. Ga.*

It is true, then, that to hold such a will, void, is a sure way of preventing it from increasing the number of free persons of color in the State.

To hold such a will, valid, is a sure way to *increase* the number of free persons of color in the State, for a time.

The negroes intended to be manumitted by such a will, must remain in the State for a time, after the testator's death. They must remain there until probate of the will and payment of the debts. During this time, they must, I say, be free persons; they cannot be slaves, for their rights vest in them, on the death of the testator, and where rights begin, slavery ends. A slave is a chattel to all intents and purposes whatsoever. "Negroes," "mulattoes," "shall be taken and deemed in law to be chattels personal in the hands of their respective owners or possessors, and their executors, administrators, and assigns, to all intents and purposes whatsoever." *Act of 1770, Sec. 1, Cobb Dig. 971.* A chattel can have no rights.

To hold the will, valid, then, is to say, that the negroes become free persons, and that as such, they are to stay in the State, for a time.

This, therefore, is a sure way to make the will *increase* the number of free persons of color in the State, for a time.

It is a way that may make the will increase their number for all time.

The negroes being free in the State, for the time, the executor may consent to their remaining free in the State, for all time. To consent to this, is not to expose himself to any suit or risk; and the affair is one confined to him and the negroes. The will having been held valid, the heirs of the testator are barred, much more are strangers.

To hold the will valid, then, is to make it increase the number of free persons of color in the State, for all time, provided only, the negroes can buy, or beg, or otherwise procure, the consent of the executor, to their remaining in the State, for all time.

Indeed, it is far from clear, that the negroes will not have the power, if not the right, to remain in the State for all time, even without the consent of the executor.

The negroes becoming free for a time, does it not follow, that they become free for all time? May we not say, once a

freeman, always a freeman. What process has the law, for turning a free man into a slave?

If then, it be true, that the law has no process by which the freed negroes may be turned back into slaves, even although they remain in the State, it follows, that if they do remain, they will, for all time, increase the number of free persons of color in the State.

And may they not remain if they please. It is true, the will requires the executor to remove them to a free State. But does this give him the right to remove them against their wish? The going to a free State, is a thing for *their* benefit—and *quilibet potest renunciare juri pro se introducto*. And supposing it does—how is he to enforce the right? There is no writ by which, one freeman can take another freeman and put him out of the State. The executor, then, cannot enforce the right by law. His physical power, therefore, is all that is left him to resort to, and this, it will generally happen, will be, as the physical power of one, to the physical power of many.

Is it not true, then, that it is a doubtful question, whether the negroes will not have the power, if not the right, to remain in the State for all time, even without the consent of the executor? I think so.

But suppose the negroes all to have been, some how, removed into the free States, what is to prevent them from returning? Penalties? A feeble barrier. Already one or more of the negroes manumitted by the *Waters Will* (19 Ga. 65,) have returned from Liberia—a feat far more difficult, than the return of such negroes from any one of the free States. And what is more, public opinion, as far as I can judge of it, welcomes their return.

It is not only true, then, that to hold such a will as this, valid, is a sure way to make it add temporarily to the number of free persons of color in the State; but it is further true, that to do so, is a sure way to make it give chances for additions to be permanently added to their number.

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Therefore, I say it is true, that, to follow the *letter* of the statute and hold such a will as this, void, is the best possible way of accomplishing the *spirit* of the statute.

So much for the second of the propositions, and its proof.

3. When the *letter* of a statute, says, that a writing shall be void; and when, to hold it, void, is the best possible way of accomplishing the *spirit* of the statute, Courts are bound to hold the writing void.

To say the contrary, is to say, that Courts are not bound by law; for if the *letter* of a statute, when backed by the *spirit* of the statute, is not law, nothing can be law.

Thus, then, I have re-stated the three propositions with the proof. And the general conclusion, to which they lead, is, that Courts are bound to hold such a will as this, void, if Courts are bound by law.

I remark, that I have rested these propositions on the Act of 1818, but that I could just as well have rested them on the Act of 1801. The propositions derive equal support from both Acts.

Now what have I heard, in answer to these propositions? A denial of any of them? Never. I have heard two things, in answer to them.

Of these, the first may be thus stated: A man, while alive, may himself, carry his slaves to a free country, and so liberate them there; whatever a man may himself do, while alive, he may, by will, authorize an executor to do, after his death.

To this, I reply, that a man cannot authorize any thing to be done by a will that is void, and, that a will for effecting emancipation even out of the State, is, as we have seen, a will that is void.

The second, is, *decisions*;—a decision made by a Superior Court in 1830; (*Dudley R.* 170;) and several decisions of this Court, made within the last ten or a dozen years.

To this I reply, first, that if the three propositions are true, these decisions were wrong; for they are decisions directly

repugnant to two statutes—the said statutes of 1801, and 1818.

Secondly, I say that they are decisions which have met with nothing but rebellion, and that continually; witness the ever recurring caveats to wills giving any kind of manumission.

Thirdly, I say, that they are decisions of which the first was made before the anti-slavery sentiment had quite left us; and that the others are decisions which, as I persuade myself, merely followed the first, being made on the notion, that a precedent is to be followed, not questioned; and I say, that decisions made on that principle, cannot have as much authoritative force, as decisions made on the principle, that law is to be followed, even although a precedent has to be questioned. An echo is not entitled to rank with an original sound.

The question, then, becomes this, are Courts bound to follow decisions that are wrong? Rather a startling doctrine; but it is nevertheless, one which I must admit has, at least, has had, a place in the law. On it rest, common recoveries, for one thing. *Communis error facit jus*; so it is said. But then, I ask, what is *communis error*? And, I answer, that it is an error which must have been living and growing for a long time, so that it has its roots running and spreading every where in the community, and to tear it up, would be, to tear the community up with it. Is the error of these decisions such an error as this? Surely not. Its beginning was within less than thirty years ago; its few repetitions were quite recent—within the last dozen years; it has not a root running out into the community, for the beneficiaries of it, having gone abroad to the emancipation there prepared for them, have ceased to be a part of the community. Correcting the error, therefore, would not touch anything held by the community. True it may be, that correcting it would be disappointing expectation in the case in which the correction was made, and possibly, in some few others, those

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coming into existence at about the same time with that case; but this would happen, if the decision were not a decision correcting an error, but were an original decision. It must happen, that a first decision will disappoint one side or the other.

I do not think, then, that Courts are bound to follow these erroneous decisions.

Thus, I have said what I proposed to say.

The result is, that I find myself where I was. Therefore, I must still consider the manumission part of such a will as this, void, and, consequently, must dissent from the judgment of the Court.

SMITH & NORTH, Plaintiffs in error, vs. ELAM S. ASHCRAFT
and ELIZA S. ASHCRAFT, Defendants in error.

A demand for \$28, is not beneath the dignity of a Court of Equity in Georgia.

Equity, from Coweta county. Decided by Judge HAMMOND, September Term, 1857.

A bill in equity was filed in the Court below, seeking to recover the sum of \$28. The plaintiff stated in his bill, that the debt was contracted by the defendant, Eliza Ashcraft; that her husband Elam S. Ashcraft was insolvent, and that the defendant Eliza had property settled to her separate use, and prayed that the defendant Eliza Ashcraft might be decreed to pay the debt out of that separate estate.

A motion was made to dismiss the bill on the ground that it was beneath the dignity of a Court of Equity. The Court

sustained the motion and dismissed the bill, and to this decision of the Court, the complainants excepted.

POWELL, for plaintiffs in error.

BUCHANAN, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Is a demand for only \$28, beneath the dignity of a Court of Equity, and therefore one not to be entertained by a Court of Equity? The Court below decided that it is.

In this, the Court we think, erred. The fifty-third section of the Judiciary Act of 1799, declares, that "the Superior Courts in the several counties *shall exercise* the powers of a Court of Equity in *all* cases where a common law remedy is not adequate," &c. The italicising is mine.

Language so imperative, and so comprehensive, as this, must have the effect to abrogate the rule, excluding from the Court of Chancery, suits, "where the subject matter of the litigation is under the value of 10*l*."—1. *Danl. Ch. Pr.* 431.

The late Act allowing suits at law, against trustees, &c. will, doubtless, go far to relieve Courts of Equity of such suits as this, in the future.

Judgment reversed.

JAMES PRICE, plaintiff in error, vs. THE STATE, defendant in error.

THE SAME vs. THE SAME.

The 18th section of the 14th Division of the Penal Code, authorizes a demand for trial, to be made at the first, or at the second Term, but not afterwards.

Indictment, from Polk county. Decided by Judge HAMMONE, October Term, 1857.

At April Term 1856, Price was indicted in two cases, for "keeping open a Tippling House on the Sabbath day." At the April Term, 1857, being the third Term afterwards, he made a demand for trial, which was entered on the minutes of the Court. At the next Term, the State was not ready for trial, and the defendant insisted on being discharged.

The Court refused to discharge him on the ground, that the demand was not made at the Term of the Court at which the indictment was found, or at the next succeeding Term thereafter.

To this decision of the Court, the defendant filed his bill of exceptions, and assigned the same as error.

CHISOLM & WADDELL, for plaintiff in error.

SOL. GEN'L, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The 18th section of the 14th division of the Penal Code, is in the following words: "Any person against whom a true bill of indictment is found, for an offence not affecting his or her life, may demand a trial at the term when the indictment is found, or at the next succeeding Term, thereafter, which demand shall be placed upon the minutes of the Court; and if such person shall not be tried at the Term when the demand is made, or at the next succeeding Term thereafter; *provided*, that at both Terms there were juries empannelled and qualified to try such prisoner, then he or she shall be absolutely discharged and acquitted of the offence charged in the indictment."—*Pr. Dig.* 661.

In the present case, the demand was not made until the third Term. Was it a demand authorized by this section?

It certainly was not a demand authorized by the *letter* of the section; it may be doubted, whether it was not a demand *forbidden* by the *letter* of the section; *expressio unius exclusio alterius*.

To make this a demand authorized by the section, it is necessary, then, to enlarge the letter of the section by construction. That is a dangerous expedient; therefore, one not to be resorted to, unless there be some pressing reason for it. Is there any pressing reason for enlarging the letter of this section? I can see none. The right to demand a trial at the first Term, and also at the second, and to stand acquitted, if there is no trial at the Term of the demand, or at the Term next after that, is as much as an innocent man can need, and more than a guilty man deserves.

Cases not falling within the letter of this section, may well content themselves with the old rule, which allows the defendant to bring on his trial, by a special notice to the prosecutor.—1 *Chitty Cr. Law* 488.

It is doubtful, whether the section, even when restricted to its letter, does not do more harm than good. It certainly presents a great temptation to defendants in criminal cases of the grade covered by it, to demand a trial, and then get the State's witnesses out of the way. And it is notorious, that many defendants yield to the temptation.

We think then, that there is no sufficient reason to justify enlarging this section, by construction, beyond its letter.

True, this opinion is in conflict with that expressed in *Denny vs. The State*, 6 Ga. 491. But that was an opinion with which the Court has been dissatisfied, for some time.—*Jordan vs. The State*, 18 Ga. 532.

We think, then, that the Court below, was right in holding, that the demands in these two cases, respectively, were unauthorized; and therefore, right in disregarding them.

Judgments affirmed.

Harris vs. Broyles.

ZACHARIAH N. HARRIS, plaintiff in error, vs. **THOMAS J. BROYLES**, defendant in error.

A party arrested by *ca. sa.*, and giving bond to take the benefit of the Act of 1823, for the relief of honest debtors, is not subject to be arrested a second time, by the same *ca. sa.*, until the case made by the giving of the bond, has been ended.

Illegality, from Cherokee county. Decided by Judge RICE, September Term, 1857.

The plaintiff in error being arrested on a *ca. sa.* at the suit of Thomas J. Broyles, filed an affidavit of illegality, upon the grounds that he had been before arrested on the same *ca. sa.* and that his second arrest had been made while the bond which had been given by him for his appearance under the first arrest had not been returned by the Sheriff; and the plaintiff, by his counsel, had obtained a rule absolute against the Sheriff, for his neglect in not making a return of the bond for the full amount due on the *ca. sa.*; which rule absolute was still in full force, or paid off and discharged by the Sheriff. He also stated, in his affidavit of illegality, that he attended the Court to which the *ca. sa.* was returnable according to the terms of the bond, but that the bond was not returned to that or to the next Court, which he also attended; and that some two weeks afterwards, he saw the bond in the hands of the arresting officer, who told him that he had not returned it to the Court.

A motion was made to dismiss this affidavit of illegality on all the grounds; which motion was sustained by the Court.

The defendant filed his bill of exceptions, alleging,

1st. That the Court erred in dismissing said illegality, and in overruling said affidavit on all and each of the grounds set forth in the same.

2d. That the Court erred in granting an order to plaintiff's counsel to enter up judgment on said bond against defendant and his security as for default of appearance.

Thomas vs. Ellis.

COOPER; WATERS; and KNIGHT, for plaintiff in error.

IRWIN & LESTER, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Can a person who has been arrested under a *ca. sa.* and has given bond under the honest debtor's Act of 1823, be arrested under the same *ca. sa.* a second time, before the case made by the giving of the bond, has been ended? We think not.

"Upon such debtor or debtors tendering such bond or bonds, it shall be the duty of such Sheriff, Deputy or Constable, as the case may be, to release him, her, or them from confinement or custody." *Pr. Dig.* 492. This is what the Act says.

We think, therefore, that the Court erred in dismissing the illegality.

Judgment reversed.

DANIEL THOMAS, plaintiff in error, vs. JAMES ELLIS, defendant in error.

A jury is bound to consider, even illegal testimony, if it goes before them, without objection.

Certiorari, from Fannin county. Decided by Judge RICE, November Term, 1857.

This case came up in the Court below upon a *certiorari*. Thomas sued Ellis in a Justice's Court on two notes. To that action Ellis pleaded the general issue; and further, that

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an attachment had been sued out against one Bryson, and garnishment been issued against him, Ellis, upon which judgment had been rendered against him in Tennessee. The verdict was for the plaintiff, and defendant, Ellis, filed his petition for a writ of *certiorari*. In the petition the above facts were stated, and that at the time the notes were traded to Thomas by Bryson, the garnishment was known to him.

This petition was answered, and when it came on to be heard, a motion was made to dismiss the *certiorari*, on the ground that there was no error set out in the petition.

This motion was overruled by the Court, and the *certiorari* sustained, and a new trial ordered; and to these decisions the defendant excepted.

MARTIN, for plaintiff in error.

CHASTAIN; and UNDERWOOD, for defendant in error.

By the Court.—BENNING J. delivering the opinion.

It seems that Bryson held notes on Ellis, to the amount of \$120. That Bryson was indebted to McCoy, that McCoy sued Bryson on this indebtedness in Tennessee, and garnished Ellis, that judgment was rendered against Ellis, as garnishee, for \$40 85, on which Ellis paid \$20; that while the garnishment was pending, Bryson traded the notes he held on Ellis, or at least two of them, amounting to \$50, to Thomas, who had notice of the garnishment; that, afterwards, Thomas sued Ellis on these two notes, and Ellis pleaded the foregoing facts, and proved them by the depositions of Bryson and those of Corinth, the magistrate who gave the judgment in Tennessee; that, notwithstanding the plea and proof, the jury found for Thomas \$50; that Ellis petitioned for a *certiorari* and obtained it, and that it was answered by the Justice of the Peace.

This was the case in the Superior Court.

This being the case, the counsel for Thomas, moved to dismiss the *certiorari*, placing the motion on the ground, that "no error was alleged in the petition." This motion the Court overruled, and that was excepted to.

And then the Court "upon reading the answer" sustained the *certiorari*, and that was also excepted to.

As to the first exception it is sufficient to say, that the answer was in, and that if it showed error, the *certiorari* ought to have been sustained, even if the petition showed none.

Did this answer show error? The answer showed the facts above stated.

It was argued for Thomas that even the answer did not show any error; and in support of the argument, several positions were taken, as follows:

1st. That there was no proof of any judgment in the garnishment in Tennessee, it being assumed, that the depositions of the Tennessee magistrate, proving the judgment, were not evidence of a proper sort, for proving a judgment, and, that as such, they must be treated as amounting to no proof at all of this judgment. But they were *in*, and without objection, and, after verdict, it is too late to insist, that the jury were not bound to regard even illegal testimony admitted to them without objection.

We do not decide that this *was* illegal. We decide nothing as to that.

We think, however, legal or illegal, as it went to the jury without objection, they were bound to consider it.

2dly. That a bare judgment in garnishment without a satisfaction of it, is not a bar to a suit by the debtor, against the garnishee.

True; but here Ellis *had* paid a part of this judgment, \$20.

3dly. That the indebtedness of the garnishee, amounted to as much as \$120; that the judgment against him was for only \$40 85. Consequently, that if he had paid all of it, he would be still left owing some \$80, of the indebtedness; and

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that this was more than Thomas claimed of him, he claiming only \$50, the amount of two notes.

But there is some room for an inference, that Ellis had paid to Bryson all of the indebtedness, except enough to cover the judgment in garnishment. When Thomas bought the notes on Ellis, he bought them *at his own risk*, knowing of the pending garnishment. So swears Bryson. Thomas was present when the judgment on the garnishment was rendered, and, in reply to a question of the Justice rendering the judgment, he said, that Mr. McCoy, (the garnishing creditor,) would be able to prove, that Bryson was the holder of the notes on Ellis, at the time Ellis was garnisheed, for Bryson had told him, that he held the notes at that time. So swears the Justice.

There is some ground here, for an inference, that Ellis had paid Bryson all of the indebtedness but \$50, a sum about sufficient to cover the garnishment, judgment, principal, interest and costs.

The effect of the judgment sustaining the *certiorari*, was merely, to bring about a *new trial*. And we think, that with such a ground as this, for such an inference as this, a judgment merely ordering a new trial, ought not to be disturbed, and we think this, the more, as it does not appear, that *on the trial*, Thomas attempted to meet Ellis's plea, by showing *this matter*. Is it not an after thought, suggested, not by the case as it is, but by the case as it happens to stand stated by the Justice of the Peace, whose memory or whose sense of materiality may have left out some of the things which really existed.

Judgment affirmed.

Walker, guardian, vs. Wells.

DAWSON A. WALKER, guardian, plaintiff in error, vs. **ANDREW J. WELLS**, defendant in error.

A grant was to "Berry Stephens, orphan." There was no person of that name, but there was a person who was the orphan of Berry Stephens.

Held, that parol evidence was admissible, to show him the person meant.

Ejectment, from Gordon county. Tried before Judge **TRIPPE**, September Term, 1857.

This was an action of ejectment, for the recovery of a lot of land No. 282, of the 13th district and 3d section of Gordon county.

Upon the trial the plaintiff introduced the grant of the lot in question, from the State, to Berry Stephens, orphan, of the 633d district of Dooly county. He also introduced his letters of guardianship.

Plaintiff then tendered in evidence the depositions of Amos Lane, and Elizabeth Lane his wife, Granville White, and Nancy White his wife. These depositions went to prove that Berry Stephens, in 1823, married Elizabeth White, and died in 1825 or 1826, leaving an only child called William Henry Stephens; that Elizabeth Stephens then moved to her father's, in Twiggs county, with the said William Henry Stephens; and that her father moved to Dooly county, with his daughter Elizabeth and grand-son William Henry Stephens and that William Henry Stephens lived in the 633d district of Dooly county at the time of giving in for draws in the Cherokee land lottery; that Elizabeth Stephens gave in for Berry Stephens' orphan, William Henry Stephens. The witnesses also stated that they did not think it possible that there was any other person in the said district answering the description; that Elizabeth Stephens, in 1834, married Amos Lane, who died in 1839; that the friends of William Henry Stephens have always considered the lot of land as belonging to him, and have paid taxes for it as his property; that the

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said Elizabeth Stephens was illiterate, and that the mistake may have occurred by her giving in the wrong name.

To the introduction of this testimony the defendant objected, on the ground that it was in contradiction of the grant, and therefore not admissible.

After argument, the Court sustained the objection and rejected the evidence.

The plaintiff thereupon excepted, and submitted to a non-suit.

WALKER, for plaintiff in error.

AKIN; and WOFFORD, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Were the depositions admissible, as evidence?

They were if the case was one of *latent*, and not one of *patent*, ambiguity. Lord Bacon's maxim is, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione jacti tollitur.*"

And this case *was* one of latent ambiguity. Lord Bacon says: "*patens,*" (*ambiguitas,*) is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

In the present case, the grant is plainly a grant to Berry Stephens, an orphan. It is, therefore, a grant upon the face of which, there is nothing ambiguous.

But it turns out, that there was never such a person as Berry Stephens, an orphan. It must be, that some *person*, not a mere *name*, was meant. Who then was the person meant by the name? This is the necessary question. Who he was is ambiguous—doubtful.

Here then is a "collateral matter out of the" grant, "that breedeth the ambiguity." The case, therefore, is one of *latent* ambiguity; "therefore, it shall be holpen by averment." Of course averment may be supported by proof. 1 *Green. Ex. sec.* 297.

To this effect are *Greene vs. Barnwell*, 11 *Ga.* 283; *Henderson vs. Hackney*, 16 *Ga.* 525; *same case*, at Atlanta, Aug., 1857; *Ford vs. Allcorn*, at Atlanta, Aug., 1857; *Bowens vs. Slaughters*, Macon, Jan., 1858; and the *Act of 22d December*, 1857, declaratory of the law of evidence in such cases as the present.

To the contrary, I think, are *Sykes vs. McCrary*, 10 *Ga.* 465; and *Yawn vs. Tyson*, 15 *Ga.* 491; and, therefore, they are, in my opinion, wrong.

The decision made by this Court, in this case, when the case was in the form of a bill to correct the grant, went upon the assumption, that there was such a person, as Berry Stephens, an orphan, and that, it was he to whom the grant was really issued. On that assumption, the decision still seems to us right. 17 *Ga.* 550.

We think then that these depositions ought to have been received. They merely went to show who was the person meant by the name and description "Berry Stephens, orphan," there never having been any person in existence bearing that name and description.

The Court having excluded the depositions, it follows, that in our opinion, there ought to be a new trial.

New trial granted.

Brown & Bowen vs. Robinson.

BROWN & BOWEN, plaintiffs in error, vs. N. M. ROBINSON,
defendant in error.

If no objection is made to the admission of illegal evidence, its admission will not be ground for a new trial.

New trial, from Heard county. Decided by Judge HAMMOND, August Term, 1857.

Brown & Bowen brought an action in a Justice Court against Robinson on an open account for \$28 75. The Court gave judgment for the plaintiff for the full amount. The defendant appealed. When the case came on for hearing, upon the appeal, the defendant did not appear. Plaintiff's counsel read an affidavit made by Bowen, proving two of the items in the account, amounting to \$4 50. This affidavit was made in Coweta county, under the provisions of the Act of 1827, which provides that when the debtor removes or resides out of the county where the debt was contracted, the creditor may prove the debt by affidavit.

The jury found for the plaintiff. The defendant carried the case by *certiorari* to the Superior Court, assigning that the Justices' Court erred in allowing the plaintiffs to go to trial, there being an agreement between the parties to continue the case in the absence of either party; that the jury erred in returning a verdict for the plaintiff, the affidavit of Brown not being within the terms of the statute; and because the evidence was not sufficient to warrant the verdict. The Court granted a new trial in the Justices' Court on the ground that it did not appear that the case came within the terms of the statute of 1827. And counsel for defendants in *certiorari* excepted.

OLIVER & FEATHERSTONE, for the plaintiffs in error.

ROBINSON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The question is, whether the Court below was right in ordering a new trial in the Justices' Court.

The ground on which that order was put, was, that the affidavit of Bowen, one of the plaintiffs, proving the first and last items in the account, the two amounting to \$4 50, was not admissible as evidence.

But, first, the admission of the affidavit was not objected to by Robinson, the defendant, and the admission of illegal evidence is no ground for a new trial, when no objection is made to the admission of it. *Harrison vs. Young*, 9 Ga. 359.

Secondly, it is not clear, by any means, that the admission of the affidavit was illegal. The affidavit was, to prove two items (out of a number) in an account. The statute says, that such an affidavit may be used for such a purpose, in the case in which the party contracting the account removes, or resides, out of the county in which the account was contracted; the statute also says, that "if the defendant will make an affidavit" "denying the justice" "of the account, the said Court shall not give judgment for so much thereof as may be so traversed or controverted, unless supported by other proof." *Cobb*, 649.

Now if the account was contracted in *Coweta*, (the suit being in *Heard*) the admission of the affidavit was legal.

Are we not bound to *presume* that the account was contracted in *Coweta*? Why was not the affidavit objected to? Did the defendant know that the account was contracted in *Coweta*, and that on the making of such an objection, that fact would be proved by the plaintiffs? What other reason is supposable? especially, seeing that the venue put, both to the account, and to the affidavit, is of *Coweta* county?

Thirdly, even if the objection to the affidavit was good, and was now available, is the case not one in which the ver-

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dict ought, for another reason, not to be disturbed? The defendant put in a plea, in which he denied the justice of every item in the account, *these two excepted*; and as to these two, he was silent. Is not this an implied admission of the justice of these two items? At least, may we not hold it so after verdict? The other items were proved in an unexceptionable manner.

Upon the whole, we think that the Court erred in sustaining the *certiorari*.

Judgment reversed

MATEIAS TURNER, SEN., and others, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

The Solicitor General moved to continue, saying, that the State was not ready. The Court granted the motion.

Held, That as an abuse of discretion does not here affirmatively appear, this Court would not interfere with the judgment, if it could;—

And that, as it *could not* do so if it would, the case is one that it ought not to entertain.

Murder and continuance, from Cass county, decided by Judge TRIPPE, September Term, 1857.

The plaintiffs in error were indicted for murder. When the case came on for trial in the Court below, and the prisoners had announced themselves ready for trial, the Solicitor General stated that the State was not ready for trial, and moved the Court to continue the case without making any othershowing for the continuance.

The Court sustained the motion and continued the case and the prisoners excepted and filed their bill of exceptions saying, that the Court erred in continuing the case, and in

ruling that the State was not required to make a showing for a continuance in a case charging the defendants with murder.

MILNER, PARROTT, CHISOLM & WADDELL, for plaintiffs in error.

SOLICITOR GENERAL, *Contra*.

By the Court.—BENNING J. delivering the opinion.

Continuances, being within the discretion of the Court, the *onus* is upon the party objecting to a continuance, to show, that, in granting the continuance, the Court abused its discretion. Presumption will be in favor of the continuance.

In this case, the Solicitor General, said "that the State was not ready for trial." No question was asked him. There may have been a good reason why the State was not ready; and a reason within the knowledge of the Court. It is, therefore, to be presumed that there was,—especially, as the Solicitor General was a public officer, on whom is imposed the duty of being diligent in preparing such cases for trial; and it is *prima facie* to be presumed of every public officer, that he does his duty.

Besides, the Solicitor General has the unlimited power of "*not prossing*" the bill of indictment, and then of preferring it again. The exercise of such a power, is but a round-about way of continuing the case. Hence, in some circuits, perhaps, in many, the Solicitor General is allowed to continue the case, at his mere pleasure.

These are reasons why this Court would not interfere with this continuance, if it *could*. But it *could not*, if it would. The judgment granting a continuance, is in its own nature one which, even if wrong, is beyond this Court's power of correction. And this Court, is only for the correction of errors.

Alexander vs. Markham.

This Court has, therefore, come to the conclusion, that it ought to dismiss writs of errors founded on judgments granting continuances, or, on any other judgments, which, in their own nature, are such that, if erroneous, they are beyond the reach of this Court's corrective power, this conclusion it will execute as soon as the case in which it was arrived at, shall have been published. That is the case of *Wimberly vs. Collier*, decided at Macon January 1858.

A judgment *refusing* a continuance, stands upon a different footing.

Judgment affirmed.

AARON ALEXANDER, plaintiff in error, vs. WILLIAM MARKHAM, defendant in error.

When the equity of an injunction bill, has been sworn off by the answer, the injunction may be dissolved.

Equity, from Fulton County. Decided by Judge BULL, October Term, 1857.

Aaron Alexander filed his bill for an injunction to restrain the Sheriff from proceeding on a *fi. fa.* In September, 1856, William Markham instituted his action of *assumpsit* against the said Alexander, founded on two promissory notes, which Alexander had given him in payment of certain lands in the city of Atlanta, in the county of Fulton. The plaintiff alleged in his bill, that these notes were given on the representation by the said Markham, that he had a good title to the said lot of land. That before the notes became due, he became aware that the defendant had not a good legal and

Alexander vs. Markham.

unincumbered title to the land, as he represented, and declined to pay the notes. That the lot of land was incumbered by a mortgage to the Loan and Building Association of Atlanta. That the value of the lands in Atlanta had increased within a short time, to a very great extent, but that he believed they were on the decline, and that such decline might ruin many of the landholders of the city of Atlanta, who had not paid for their lots, and that he believed that the said defendant would become by such means unable to respond in damages for the price of the lots so bought by plaintiff. That after the action was commenced by Markham, plaintiff pleaded a good plea to the same, intending to defend the suit. That although his attorneys were at the Court at which the trial was to be had, Markham's attorney privately, and without their knowledge or consent, and without the case being called in its order, went to the jury, and presented a verdict to them, as if the case had not been defended, and procured the same to be signed *ex parte*; that plaintiff's plea by an unforeseen accident, did not come to the eye of the attorney for Markham. That the first plaintiff heard of the verdict was from the Sheriff, showing him the *fi. fa.* founded on the judgment entered up upon said verdict, and telling him he had orders to make the money on said *fi. fa.* immediately.

The defendant answered this bill, and moved to dissolve the injunction which had been granted according to the prayer of the bill. The plaintiff objected to the hearing of this motion, on the grounds :

1st. That exceptions to the answer of the defendant had been filed (and should first be disposed of,) because said bill had not been sufficiently answered in that the defendant had not answered, whether or not his property consisted in Atlanta lands of fictitious value, and answered evasively, as to his insolvency.

2d. Because defendant did not answer whether he had a

Alexander vs. Markham.

good title to said lands, and such a one as would enable him to make a good and sufficient title to complainant.

3d. Defendant did not say in his answer that he ever had any perfect title to said land.

Plaintiff's counsel insisted that the injunction should not be dissolved, because the equity in the bill had not been sworn off. He also objected to the reading of an affidavit alluded to in the *rule nisi*, for the dissolution of the injunction, because it did not form part of defendant's answer, it not having been made an exhibit to said answer, and also, because it had not been filed in the office of the Clerk of the Superior Court.

The Court refused to dispose of these exceptions by themselves, but allowed argument on the motion to dissolve the injunction, that the Court might dispose of the whole case at once.

The Court allowed the said affidavit to be read on the argument, to which complainant's counsel excepted.

After hearing the argument, the Court granted an order dissolving the injunction.

To this decision of the Court, counsel for complainant excepted and filed his bill of exceptions, saying that the Court erred.

1st. In allowing said affidavit to be read in the argument.

2d. In dissolving said injunction.

HAMMOND & SON, for plaintiff in error.

OVERBY & BLECKLEY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The answer says, that the "incumbrance" complained of in the bill, had been removed. The whole equity of the

bill depended upon the existence of this incumbrance. The removal of the incumbrance was, therefore, equivalent to abstracting from the bill, all its equity.

We think, then, that the order dissolving the injunction, was right.

Judgment affirmed.

**BARRETT & WILLIFORD, and others, plaintiffs in error, vs.
BLACK, COBB, & Co., defendants in error.**

[1.] 'A man residing in Rome, wounded another, and fled into Alabama, leaving his wife behind him, who continued residing where they had been residing, when he fled. In the course of a few months, he was sued, and copies of the writs were left for him, with his wife, at the place at which he was residing when he fled.

Held, that there was not enough in this to show that he had changed his domicile at Rome for any other domicile; and, therefore, that the suits were well served.

[2.] The Act of 1856, enlarging the jurisdiction of Justices' Courts to demands not exceeding fifty dollars, includes demands sued for by *attachment*, as much as demands sued for by ordinary process.

Certiorari, from Floyd county. Decision by Judge HAMMOND, at February Term, 1858.

J. R. Saxon, a citizen of Rome, Floyd county, having committed a crime, fled to the State of Alabama, where he remained; his wife, however, continued to reside in Rome. After his departure from the State, and in May, 1857, Barrett & Williford sued out an attachment for \$42 50, returnable to a Justices' Court; and in June thereafter, Black, Cobb & Co. sued out an attachment for \$77 60, returnable to the Superior Court. Both attachments were levied upon property belonging to Saxon, by a bailiff. E. P. Treadaway afterwards commenced his ordinary action of debt against Saxon for

Barrett & Williford et al. vs. Black, Cobb & Co.

\$40; and Gregory & Wooten a like action for \$44 50, both returnable to a Justice's Court.

At June Term, 1857, of the Justice's Court, judgment was obtained in the attachment case of Barrett & Williford and also in the ordinary action of Treadaway, the same being for rent; and at the July Term, judgment was had in the case of Gregory & Wooten. The bailiff in the suits of Treadaway, and Gregory & Wooten, had left a copy summons with the wife of Saxon, and had returned, that they had been left at his most notorious place of abode.

The property levied on by virtue of the attachment of Barrett & Williford was sold under an order of the Justices' Court, and brought \$144 65, and that Court ordered the same to be paid to the attachment of Barrett and Williford, and to the judgments of Treadaway and Gregory and Wooten. To this order Black, Cobb and Co. excepted, and brought the case by *certiorari* before the Superior Court. That Court sustained the *certiorari*, and ordered the bailiff to pay the money to the Clerk of said Court, to be held subject to its order.

To this decision counsel for defendants in *certiorari* excepted.

H. A. GARTRELL, for plaintiffs in error.

R. D. HARVEY, *contra*.

By the Court.—BENNING J. delivering the opinion.

When it is shown that a man has acquired a domicile, it will be presumed that he retains that domicile until it be shown that he has changed it for another. This may be assumed.

It was shown that Saxon had acquired a domicile at Rome. It was shown that he was residing there with his wife.

Now, was it also shown that he had changed this domicile? All that was shown in proof that he had, was, that he, wounding a man, had fled into Alabama. And even the proving of this, we have to trust to the *petition* for

certiorari of the party, not to the *answer* of the Justice of the Peace.

There is nothing in the evidence to show that he made any stop at any particular place in Alabama; nothing to show that he had not left that State. His wife still remained residing at the place in Rome at which he was residing when he fled from justice; the time he had been gone was only a few months.

This was the case made by the evidence; and we think that there is not enough in this case to show that he had changed his domicil at Rome for any other.

[1.] Consequently, we think that the suits of Treadaway, and Gregory & Wooten, which were served by the leaving of copies with Saxon's wife, at the place in Rome at which he was residing when he fled to Alabama, were well served; and that the judgment of the Court below, declaring them ill served, was erroneous.

Barrett & Williford's attachment was for over \$30. Was the case beyond the jurisdiction of a Justices' Court?

The 6th section of the attachment Act of 1856 declares, that "when the amount sworn to shall exceed the sum of thirty dollars, the attachment shall be made returnable to the Superior or Inferior Court," &c.

The *object* of this section was to define where attachments within the jurisdiction of a Justices' Court shall be *returned*, and where those beyond the jurisdiction of that Court shall be *returned*; it was not the object, to define what cases are, and what are not, within *the jurisdiction* of that Court.

[2.] But even if this *was* the object, it would make no difference. This Act was passed on the 4th of March, 1856. On the 5th of March, 1856, another Act was passed, of which the first section is as follows: "That from and after the first day of March next, the jurisdiction of Justices of the Peace shall extend to the amount of fifty dollars, principal with interest."

That this language was intended to include suits by *at-*

Sullivan vs Richardson and Ketchum.

attachment, as much as suits by ordinary process, is apparent from the second section, which declares, that it "shall and may be lawful for all promissory notes, accounts, and all other evidence of debts that do not exceed fifty dollars, to be sued before a Justice of the Peace, in a Justices' Court *in the same manner as is now prescribed by law,*" &c. The italicising is mine.

This Act, being the later of the two, must prevail, even if the other is to be construed, as in conflict with it.

So, we think that the Court erred in holding Barrett & Williford's attachment not within the jurisdiction of the Justices' Court.

Judgment reversed.

F. J. SULLIVAN, plaintiff in error, vs. R. R. RICHARDSON
and WILLIAM KETCHUM, defendants in error.

When a question of fact is, by agreement, referred to the Court, and there is evidence on both sides of the question, the decision, be it which way it may, will not be reversed.

Motion, from Floyd county. Decision by Judge HAMMOND, at August Term, 1857.

Francis J. Sullivan brought suit against Robert R. Richardson on a promissory note for \$75, returnable to August Term, 1853; bail was required, and William Ketchum and R. D. Harvey became his sureties on the bail bond. Bail bond dated 28th April, 1853.

The defendant Richardson was surrendered by Harvey, one of the bail, as appeared by the acknowledgment of the Deputy Sheriff, and the order of *exoneretur*, which were as follows:

Sullivan vs. Richardson and Ketchum.

F. J. SULLIVAN,
 vs.
 R. R. RICHARDSON. } *June 3d, 1853.*

I hereby certify, that R. D. Harvey has this day surrendered up and delivered into my hands the defendant in the above stated case in discharge of himself as bail on the bail bond.
 D. D. DUKE, *D. Shff.*

F. J. SULLIVAN,
 vs.
 R. R. RICHARDSON. } *Complaint.*

On reading and filing the acknowledgment of the Sheriff of the surrender to him of the defendant in this cause by R. D. Harvey, one of his bail in his discharge; it is ordered that the said R. D. Harvey, be exonerated from his said obligation, and that an *exoneretur* be entered on said bond.

August 20th, 1853.

JOHN H. LUMPKIN, *J. S. C. C. C.*

Judgment was confessed 22d May 1854, by defendant's attorney, signed 2d June, and *fi, fa.* issued thereon 13th June, 1854, and upon the return of "no property," a *ca. sa.* was sued out, dated 18th August, 1854, returnable to November Term, 1854, of Floyd Superior Court; upon which the Sheriff returned, that "the defendant Robert R. Richardson not to be found in Floyd county.

20th October, 1854."

Whereupon plaintiff in *ca. sa.* sued out *scire facias* against Richardson and Ketchum, to show cause at the next Term of the Superior Court, why judgment should not be entered against them, as bail.

Ketchum appeared and showed for cause: First, that the Sheriff had returned the *ca. sa.* several weeks prior to the Term of the Court to which it was returnable. Second, That R. D. Harvey, who was originally a surety on said bail

Sullivan vs. Richardson and Ketchum.

bond with him, had surrendered to the Sheriff the body of defendant in *ca. sa.* in discharge of the bail.

Upon hearing cause, the Judge dismissed the *scire facias*, and held and adjudged that Ketchum was discharged from all liability on the bail bond.

At the same Term of the Court, plaintiff moved to set aside this order, dismissing the *scire facias*, upon the following grounds:

1st. Because said order was granted on the ground that Harvey one of the sureties had been discharged from liability on the bail bond, which discharge was illegal.

2d. Because the order was granted upon a misconception of the facts.

3d. Because said order was illegal, and should not have been granted.

Issue was joined on the state of facts, and the parties agreed that the Court might hear the facts and decide the case.

Dukes, the Deputy Sheriff, testified, that he arrested defendant on the original bail process, and Harvey and Ketchum became his sureties; that Harvey delivered defendant up, and had an *exoneretur* entered on the bail bond as to himself; that he went to Ketchum, who told him he thought Harvey was easily frightened; that although Harvey was discharged, he Ketchum, would consider himself liable on the bond, provided he, Dukes, would take him, which he did.

The Court refused the motion to set aside the order dismissing the *scire facias*, putting its decision on the ground that it appeared that the *ca. sa.* had an entry of *non est inventus*, dated before the next succeeding Term of the Court, from which the *ca. sa.* issued, and Sullivan excepted.

D. S. PRINTUP, for plaintiff in error.

HARVEY, *contra.*

By the Court.—BENNING, J. delivering the opinion.

The question was, whether the order discharging Ketchum, the bail, was legal?

This question was, by agreement referred to the Court on the *facts*, as well as, on the law.

Among the facts, there was, on the *ca. sa.* an entry of *non est inventus*, bearing date some time before the return Term of the *ca. sa.* This was *prima facie* evidence, that the *ca. sa.* was returned on the day of the date of the entry, and therefore that it was returned, before it ought to have been returned.

The Sheriff testified, that it was his habit to make such entries as this, on *ca. sas.*, and yet to keep the *ca. sa.* in his possession, until their return Term.

Did this testimony overcome the *prima facie* case made by the date of the entry?

This was the question; and it was merely a question of *fact*.

The Court thought that it did not, and therefore, held that the order discharging the bail was valid.

There was evidence on both sides of the question; the evidence on neither side, was satisfactory: In such a case, what is gained by reversing the decision, whichever way that decision may be. Nothing, we think.

Therefore, we shall affirm the judgment of the Court below.

Judgment affirmed

THOMAS HAMILTON, plaintiff in error, vs. BENNETT H. CONYERS, defendant in error.

- [1.] Upon a motion for a new trial, it is a sufficient compliance with the rule of Court requiring a brief of the testimony to be filed under the approval of the Court, if the same has been substantially agreed upon by the counsel.
- [2.] If counsel have leave of absence, it dispenses with the discharge of any and every professional duty imposed upon them by the business of the Court at that Term.
- [3.] A motion for new trial may be amended, so as to perfect a brief of the testimony began, but not formally finished, at the time the application was filed; the counsel for movant agreeing to adopt the written statement of the evidence taken down at the time, by the opposite counsel.

The motion for a new trial is amendable.—BENNING J.

Motion for new trial, from Cass county. Decided by Judge TRIPPE, September Term, 1857.

The facts of this case are fully stated in the opinion of the Court.

WRIGHT & UNDERWOOD, for plaintiff in error.

AKIN; CHISOLM & WADDELL; and MILNER, *contra*.

The Court not being unanimous, the Judges delivered their opinions *seriatim*.

By the Court.—LUMPKIN, J. delivering the opinion.

This case was tried March, 1857. The verdict was for Conyers. Hamilton, by his counsel, applied for a new trial. At first, it was the intention of the parties, to have the motion decided at once, with a view to bring the case before this Court, which sat the week ensuing. Accordingly, the counsel went to work to make out and agree upon a brief of the testimony. And this was done, with the exception of the evidence of Dr. Young, which was drawn up and presented by counsel for Conyers, but objected to by the attorneys of Hamilton. The testimony of Tumlin was not written out; but

there was no difficulty made, at the time or since, as to that. At this stage of the case, the Court announced that an adjourned Term would be held in June, at which time, it was the intention of Hamilton's counsel to complete the brief of the evidence, and argue the motion.

Upon application to the presiding Judge of the Circuit, leave of absence from the adjourned Term of the Court, was granted in writing to Messrs. Underwood and Wright, who alone had control and management of the cause, and who, but for that fact, would have finished and filed an abstract of the proof, at the first Term of the Court when the judgment was rendered.

When the motion for the new trial was called up at the next regular Term in September, counsel for Hamilton moved to complete the brief and proceed with the motion, proposing to adopt the statement of Dr. Young's testimony, prepared in March by defendant's counsel, and add the testimony of Tumlin, about which there was no dispute or difficulty.

The Court refused to allow the amendment to be made, and on motion of defendant's counsel, dismissed the rule.

Was this decision right?

We think not, for three reasons.

[1.] The testimony was, *in substance*, agreed upon at the Term at which the motion was made. Dr. Young's evidence was all about which counsel differed. That was drawn up by counsel for Conyers; and although objected to at the time, was offered to be adopted at the September Term, as the evidence in the case. Were not all the objects of the rule of Court fulfilled? We take it, that the rule only requires so much of the testimony to be agreed upon or approved, as is material to a proper hearing of the motion. All else is unnecessary. Young's testimony and Tumlin's was all that was left out; Tumlin's was immaterial, and counsel for the motion agreed to take Young's testimony, as taken down in writing by their adversary at the first Term.

We need not be reminded of the importance of agreeing

Hamilton vs

THOMAS HAMILTON, plaintiff
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[1.] Upon a motion for a new trial
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I know this practice has prevailed extensively, if not gen-
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respecting it. The leave was granted, and as to the extent of
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sional duty which the business of the Court imposed upon
the counsel. Not to allow the indulgence, whether right-
ly granted or not, to operate in this case, would work a sur-
prise and injustice to the client.

[3.] In the last place, we hold that, according to the deci-
sion of this Court in *Snellings, administrator, vs. Darrell*, 17
Ga. Rep. 141, the party had the right to amend his motion
for a new trial, by completing the brief. If an additional
ground may be inserted in the motion at the hearing, and
not taken at the time the application for the new trial was
made, we can see no good reason why the brief of the testi-
mony may not be completed.

It is suggested that the case in 17th Georgia is overruled
by *Powell vs. Howell*, 21 *Ga. Rep.* 214. There is some mis-
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Judge McDonald, in delivering the opinion of the C
 thus states the case: "Although the record presents many
 assignments of error, in the decisions and judgments of the
 Court below, it will be necessary to consider those alone which
 are founded on the refusal of the Court to dismiss the *rule ni-*
si for a new trial, and as connected with it, the Court's de-
 cision allowing other grounds to be added to the rule, at the
 Term of the Court at which it was heard."

Now, it is obvious, that while the point of, whether or not
 a new ground can be added to a rule for a new trial, at the
 hearing was in this case, it not only had no connection with
 the other ground, but was not necessary at all to its decision.
 The first and main ground was to dismiss the rule for want
 of service, &c. Reversing the Court below, as we did, upon
 this ground, it was a final termination of the case, and it was
 unnecessary to discuss or decide the other ground. That the
 other was considered in the argument, and in our conference,
 I will not undertake to say; my memory is too fallible. All
 I can say is, that I have no recollection about it. The ques-
 tion was directly made; indeed, it was the only point in the
 case of *Snellings, in 17th Georgia*, argued by eminent coun-
 sel, maturely considered and deliberately decided, that a mo-
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Hamilton vs. Conyers.

consented understandingly to any reversal or modification of that opinion. I believed it right at the time; I have never doubted it since.

And for these reasons we reverse the judgment of the Court below, refusing to entertain the motion for a new trial, and allowing it to be amended, if, indeed, it required amendment.

To say nothing of the English statutes of Jeofails, which are exceedingly broad, had the 9th section of the Judiciary Act of 1799, (*Cobb*, 486,) been construed in the spirit of its authors, what a world of trouble, delay, expense and injustice would have been saved to suitors and the country. It declares that "no petition, answer, return, process, judgment or *other proceeding in any civil cause*, shall be abated, arrested, quashed or reversed, for any defect in matter of form, or for any clerical mistake or omission, not affecting the real merits of the cause; but the Court, on motion, shall cause the same to be amended, *without any additional cost, at the first term, and shall give judgment according to the right of the cause and matter of law*, as it shall appear to the said Court, *without regard to such imperfections in matter of form, clerical mistake or omission.*"

This noble Act was soon whittled away by judicial interpretation, until it became entirely nugatory. I am fully warranted in this assertion by the preamble to the Act of 1818. *Cobb*, 487. It recites, that "whereas the said Judiciary Act was intended for the purpose of bringing parties litigant to a speedy judicial decision, without delay, and with as little cost as practicable, and it was thereby intended that the small omissions of *parties*, clerks or sheriffs, not affecting the real merits of the cause, should in all cases, (substantially set out,) be amended on motion, without delay or costs; and it having grown into practice in said Courts, to give or grant a term, and sometimes nonsuit, for the smallest omissions of the officers of the said Courts, and as a further increase of the said practice may lead us back to all that tedious and expensive la-

byrinth of special pleadings, which the said Judiciary Act intended to avoid, &c.

"Be it enacted, That in every case where there is a good and legal cause of action plainly and distinctly set forth in the petition, and there is, in substance, a copy served on the defendant or defendants, or left at their most notorious place of abode, *any other objection shall* be, on motion, amended without delay or additional costs." And further, it is provided, that "no nonsuit shall be awarded when the cause of action shall be substantially set forth in the declaration, for any formal variance between the allegation and proof."

It would seem that after this, parties would have had a sufficient guaranty that their cases would be tried promptly, upon their merits; that truth had triumphed over technicality. How vain the hope! The warfare was renewed, and the contest between the Courts and the Legislature continued down to 1853—1854, when the General Assembly resolved to put an end to this struggle by depriving the Courts of all power over this subject; to make amendments a matter of *right* in the *parties*, and not of *discretion* in the *Courts*. The Act of that session provides, (*Pamphlet p. 48,*) that "parties plaintiffs and defendants in the Superior, Inferior and Corporation Courts of this State, whether at law or in equity, may at *any* stage of the cause, as *matter of right*, amend their pleadings, *in all respects*, whether in matter of form or substance only, but in case the party applying for leave to amend pleadings or to show a default, shall have been guilty of negligence in respect to the matter of amendment or default, the Court may compel him to pay his adversary the costs of the proceeding for which he moves, and may enforce other reasonable and equitable terms on him at discretion, not touching the real merits of the cause in controversy."

The right to amend, therefore, is no longer a debatable question. The only discretion left to the Courts is, the price the party shall pay for this privilege given to him by the law. And in addition to the general limitation, implied in all such

cases, upon the discretion of the Court, namely: that it must not be grossly abused, there is the further special limitation, that terms can only be imposed where the party is guilty of negligence; and further, the terms must not be such as to affect "the real merits of the cause in controversy."

Now in view of all this legislation, this Court was called on for the first time in the case of *Snellings vs. Darrell*. We ascertained that *pleadings* which this Act authorizes to be amended, has a restricted as well as a general meaning; the former beginning with the declaration, and terminating with the issue of fact, or of law, or both; the other including bills of exceptions, writs of error, motions for new trials, and every thing which transpires during the progress of the cause, from its inception to its consummation. The question was, in which sense did the Legislature intend to use the term in the statute? With the noon-tide blaze of light beaming upon us from the legislative history of amendments in this State, could any Court hesitate to conclude that the term "pleading" was designed to be used in its broad sense? We think not. If a defendant may amend his *affidavit* of illegality, either by the insertion of new grounds, or the correction of errors and mistakes in the original affidavit, as he may do, (*Cobb*, 518,) surely he may amend a motion for a new trial. The Act of 1850, allowing affidavits of illegality to be amended, I look upon as a legislative declaration, *in advance*, as to the proper construction of the Act of 1853-54, so far as it relates to new trials.

Judgment reversed

BENNING J. concurring.

I think the judgment of the Court below, erroneous. I think it, in conflict with *Snelling vs. Darrell* 17 Ga. R. and with *Candler vs. Hammond*, decided at Milledgeville, November, 1857.

It is true, that in *Powell vs. Howell*, decided at Macon, January, 1857, there are *dicta* not reconcilable with these two cases. But those *dicta* were not required by the *judgment*, which was as follows:

“Reversed, upon the ground, that there was no service of the *rule nisi* upon the opposite party.”

McDONALD, J., dissenting.

The cause was tried in the Court below at March Term 1857. A verdict was rendered for the defendant. During that Term of the Court, the counsel for the plaintiff made out a motion for a new trial, in writing, on fourteen grounds. The Court refused to pass upon it without argument. When the Court was requested to pronounce its judgment upon it, no brief of evidence had been made out and agreed upon by counsel or approved by the Court, there was no motion entered on the minutes and nothing on the docket. That it was reduced to writing by the counsel who had determined to move for a new trial, did not make it a proceeding of the Court. That the opposing counsel acknowledged service of it, and waived further notice, did constitute it a proceeding of the Court if it was not one without it. The acknowledgment of service saved the party the trouble of making a copy of the paper and serving it, but it did not impart to it a character or value which it did not possess.

The Clerk of the Court below, who was bound by law to send up a *complete transcript* of the *entire* record, sent up no motion for a new trial, not even the statement of such a case on the docket. There was, therefore, no motion in the Court. The judgment of the Court below complained of, was the refusal of the amendment of the *rule nisi*. If there was no *rule nisi*, there could have been no amendment. This motion was made at the Term of the Court next after the trial; but if there was no motion at the term, the motion to amend ought not to have been sustained. But it is assigned as a rea-

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son, that the motion was not submitted in proper form, and the brief of evidence filed, that it was postponed to an adjourned term of the Court and that the leading counsel in the cause had leave of absence at that adjourned term. This leave of absence was nothing more than an assurance to the counsel to whom it was given, that their cases in Court should not be prejudiced by their absence. It was no license to them to postpone to a subsequent term of the Court, that which must have been done at that term or not at all. If a new trial could not have been moved for at a term of the Court, subsequent to that at which the trial was had, the motion to amend, considered as an original motion for a new trial ought not to have been allowed. This Court has very fully considered the law in such cases and at a very early day gave its exposition of it. In the case of *Graddy vs. Hightower & al.*, it decided that a *rule nisi* for a new trial will not be granted in this State, at the instance of a party, unless application is first made during the term at which the judgment was rendered, and unless the application appear on the minutes of that term. 1 *Kelly* 252. It also decided that the brief of the evidence must be agreed upon by the parties or their counsel or approved by the Court, and such agreement or approval must be entered on the minutes at the term of the Court at which the judgment is rendered, and the new trial is applied for. This case settled the law, and seems to me to have settled it very satisfactorily as to the time within which a new trial must be moved for, and when the brief of the evidence must be filed. We have no statute fixing the time for moving for new trials, but the act of February 1854, to regulate the granting of new trials, recognizes the existence of a legal period, within which motions for new trials may be entertained. *Pamph.* 47. The Legislature must have considered the adjudication above referred to as settling the law on that subject in this State.

In that case, at the term when the verdict was rendered, a *rule nisi* for a new trial was moved for orally by the coun-

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sel of the defendant. A brief of the testimony, as claimed by the counsel of the movant, was presented to the Judge. The brief was objected to as imperfect by the counsel of the opposite party, and a protest against its completeness was formally made by them. No *supersedeas* was entered and no brief of the testimony agreed upon by the parties or approved by the Court. The minutes of the Court showed no action whatever touching the *rule nisi*. No motion in relation thereto was entered on the minutes. The presiding Judge took time to consider the application for the rule and took the papers with him, and some fifteen or eighteen months afterwards granted it in vacation. The rule was made absolute and a new trial was granted.

This Court set that judgment granting a new trial aside, on the grounds already stated.

There was no motion for a new trial in that case, because the minutes of the Court at the term the verdict was rendered showed none. The minutes of the Court show none in this case. If there was no motion, there was nothing to amend, As there was no *rule nisi*, the order to dismiss was supererogatory and useless.

CURTIS LEWIS, plaintiff in error, vs. RICHARD WAYNE, adm'r,
&c., defendant in error.

L. gives a mortgage to secure H. & H. for certain funds advanced by them for him, before that time, as well as to indemnify and save them harmless for any advances acceptances, or endorsements, made thereafter by the mortgagees for and on account of the mortgagor.

Held, That upon the production by mortgagees of drafts and acceptances, corresponding to the description of indebtedness, specified in the instrument that the presumption was that they had been paid by the holders out of their own funds, and upon the credit of the mortgage and not out of the funds of the drawers.

Lewis vs. Wayne, adm'r.

Foreclosure of mortgage, from Spalding county. Decision by Judge CABINESS, at November Term, 1857.

This was a proceeding by Richard Wayne, administrator of Robert H. Griffin, deceased, assignee of Hamilton & Hardeman, to foreclose a mortgage of a house and lot, executed by Curtis Lewis to said Hamilton & Hardeman.

The mortgage bears date 1st June, 1849, and was made by Lewis to secure Hamilton & Hardeman for certain funds, before that time, advanced, as well as to indemnify and save them harmless for any advances, acceptances or endorsements, made thereafter by them for and on account of said mortgagor.

The usual *rule nisi* was issued and served upon the mortgagor, who appeared and showed for cause why judgment absolute should not be entered against him :

1. Because no copy of the mortgage deed is filed with the petition for foreclosure.

2. Because there is no averment in the petition that the mortgage has any words of negotiability or assignability, by which mortgagees were authorized to assign the same.

3. Because a mortgage deed assignable, must be assigned by an instrument or endorsement under the hand and seal of the mortgagee, and if not so assigned, any action thereon must be in the name of the mortgagee for the use of the equitable owner or holder thereof.

4. Because there is no averment in the *rule nisi*, that the mortgage has been assigned in any way, verbally, or in writing.

5. Because there is no profert made, in said rule, of the mortgage.

6. Because no averment or exhibit of debts due to or liabilities incurred by the mortgagee, is made either in the petition or rule.

7. Because the drafts alleged to have been accepted, bear date after the execution of the mortgage.

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8. There is no allegation that the drafts accepted were assigned, nor were the demands of the mortgagees assignable, the same being for money advanced and due, if at all, on account.

9. Because the drafts, copies of which are annexed to the rule, were not the anticipated indebtedness and liabilities, which the mortgage was intended to secure or indemnify against.

10. Because no part of the amount or sums claimed to be due, is secured, or was intended to be secured by the mortgage.

All of which were overruled by the Court as insufficient, and defendant excepted.

Counsel for plaintiff, then offered in evidence, first, the copy mortgage, and then the original. Defendant objected on the ground that no proferet or exhibit thereof was made in the rule served on him, nor filed in office. The objection was overruled and defendant excepted.

Plaintiff next offered in evidence his letters of administration; defendant objected on the ground that no proferet thereof was made in the rule nisi, although made in the petition. The Court overruled the objection and defendant excepted.

Plaintiff then tendered in evidence the original drafts, copies of which were annexed to the rule, without proving that the drawees or mortgagees had paid or advanced the money on them. Defendant objected on the ground, that the legal presumption was that the drawer had funds in the hands of the acceptor and drawee sufficient to pay the drafts, and the plaintiff *must prove* that they were paid out of the drawees own funds, and then defendant became indebted for money paid and advanced, and not as *drawer* of the bills. The Court overruled the objection and defendant excepted.

The Court ordered the rule to be made absolute, and defendant excepted.

Whereupon counsel for defendant tendered his bill of ex

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ceptions, assigning as error the rulings and decisions above excepted to.

ANDREW R. MOORE, for plaintiff in error.

GARTRELL & GLENN, and BECK, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

I shall confine my opinion in this case to the only point about which the members of the Court had the misfortune to differ.

The mortgage in this case, bears date 1st of June, 1849, and was made by Lewis to secure Hamilton & Hardeman, for certain funds before that time advanced, as well as to indemnify and save them harmless, "for any advances, acceptances or endorsements made thereafter by them, for and on account of said mortgagor." During the trial, the plaintiffs tendered in evidence the original drafts, copies of which were annexed to the rule, without proving that the drawees or mortgagees had paid or advanced the money on them. Defendant objected to them on the ground that the legal presumption was that the drawer had funds in the hands of the acceptor and drawee sufficient to pay the drafts, and the plaintiffs must prove, that they were paid out of the drawees' own funds, and then defendant became indebted for money paid and advanced, and not as drawer of the bills. The Court overruled the objection and the defendant excepted.

And now the only point about which we disagree is, was the Court right in ruling, that under the facts of this case, the burden of proof was shifted from the shoulders of the plaintiffs to those of the defendant? A majority of the Court hold that the onus was changed, by the very terms of the mortgage, as well as the nature of the transaction between these parties.

No one doubts that ordinarily, the rule of law is, as it was asked to be applied by the defendant in this case., namely ;

that if I accept for another person, the presumption is, that I have funds of his in my hands to discharge the draft, and it is incumbent upon me to show the contrary. But what is the express agreement between these parties? Why that this mortgage which was sought to be foreclosed, was not only to secure Hamilton & Hardeman against past advances, but also to indemnify and save them harmless for any advances, acceptances, or endorsements made thereafter by them for and on account of the mortgagee. And they bring into Court and offer in evidence, paper, answering precisely to this description, acceptances made by them, for Mr. Lewis, after the first day of June, 1849. What more is there for them to do? But says the defendant, you must show that you paid the money on these drafts out of your own funds, not out of mine! The ready response is, such was not our understanding, nor my understanding. *In hac federa non veni.* Our contract was that the mortgage was to cover all acceptances made for you after its date. Here are drafts drawn, accepted and taken up by me, since the mortgage was given. I claim the benefit of the bond. I am within its stipulations. You have no right to impose additional labor on me. If I had funds of yours in my hands, show it. You bargained that for all drafts and acceptances taken up by me, after the date of the mortgage, the presumption should be, that they were paid out of our funds. Still you have the right to rebut this *prima facie* case of liability on your part. Failing to do so, I am entitled to foreclose the mortgage for the amount of these claims.

Not only are the words of the mortgage in favor of the plaintiffs, but the inference to be drawn from the nature of the transaction.

What did Hamilton & Hardeman look to for payment after the mortgage was given? To funds to be furnished by Lewis? Certainly not. The taking of the mortgage negatives this conclusion. Had they expected cotton or produce from him the mortgage would not have been taken. It was

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required, for the very reason, that they did not expect to be supplied with funds by the drawer. They were willing to advance for him, but they exacted indemnity. They had even advanced when the mortgage was executed. This is admitted upon its face, for it was to secure *past*, as well as prospective advances.

But I will not spend more time upon a point which, to my mind is plain and palpable. I am of the opinion not only that the Court was right, upon every other exception, upon which error is assigned, and about which we all agree, but upon this also.

Judgment affirmed.

BENNING, J. concurring.

Were any of the objections urged "against the foreclosure of the mortgage," good?

I do not think that the first was. The mortgage was set forth in the petition, according to its legal effect; and I do not know of any law requiring more to be done than that.

Nor the second. Wayne represented himself as the administrator of the "assignee" of the mortgagees. If this was not a sufficient averment of an assignment, the averment was amendable under the Act of 1854. With this averment sufficient, it would not be necessary for the petition to contain also an averment that the mortgage had "words of negotiability or assignability." The mortgage did in fact have such words; and under an averment of an assignment, it would be admissible as evidence. Under such averments promissory notes and bills of exchange are admitted every day.

Nor the fourth. The assignment *was* in fact, an assignment under trial.

Nor the fifth; for the reasons mentioned in disposing of the second.

Nor the sixth. The omission of a profert was remediable

by amendment. The mortgage, it seems, was present, ready to be shown, if called for. This was the matter of substance.

Nor the seventh. The petition, it seems, gave copies of the drafts, without giving copies of the endorsements and acceptances. But endorsements and acceptances existed. Copies of them, and of the drafts, are contained in the transcript; whereby it appears, that the mortgagees had incurred liabilities for the mortgagor, to the amount alleged in the petition. These omissions in the petition, then, were remediable by amendment.

Nor the eighth. The mortgage itself contemplates future advances.

Nor the ninth. It was not necessary that the drafts should be "negotiable;" or that "the money paid (if ever paid,) or the amount thereof *due* by open account, if at all," should be "assignable." The drafts were drawn on the mortgagees, and were accepted and paid by them. This raised an *account*, nothing else, in their favor, against Lewis. In fact, however, the drafts *were* negotiable; and they were negotiated; they were drawn by Lewis, payable to his own order, and were endorsed by him.

Nor the tenth. This consists of matter of fact, and there does not appear to have been any proof to support it: on the contrary, there was proof to oppose it; viz: the mortgage itself, which contemplates future advances to be made by the mortgagees, to the mortgagor.

Nor the eleventh; which is but a repetition of the tenth.

These were all of the objections urged "against the foreclosure of the mortgage," (by way of demurrer I suppose,) and they are all, I think, quite insufficient.

If these objections to the pleading were insufficient, the objection to the admission of the mortgage in evidence, must also have been insufficient.

A profert of the letters of administration, if necessary, might have been added to the rule at any time. There was a profert in the petition.

We might as well make up our minds, to accept the amendment Act of 1854.

I think the letters were admissible.

The drafts, together with the endorsements, the acceptances, and the protests for non-payment by the acceptors, and the mortgages, were read as evidence by the counsel for Wayne, the petitioner. They introduced no further evidence.

The counsel for Lewis objected to this evidence as insufficient, insisting, that it was not sufficient to show, that the mortgagees, the acceptors of the drafts, had ever paid the drafts at all; or that if it was sufficient to show this, it was not sufficient to show, that they had paid the drafts out of their own money. The Court overruled the objection.

This is a point entitled to notice.

I think that the Court was right. The drafts were protested for non-payment by the acceptors. This shows, that the drafts had got into circulation *after acceptance*. At the time of the trial, the drafts had got back into the hands of the acceptors. How did they get back there? The acceptors must have paid them. This is the presumption.

So, I think that the evidence *was* sufficient to show, that the acceptors had *paid* the drafts.

Was it sufficient to show, that they had paid the drafts out of their own funds, and not out of the effects of the drawer in their hands? I think so, not however with entire confidence in the opinion.

The *mortgage*, it is clear from its face, contemplates *advances—accommodation* acceptances, to be made by the drawer, does it contemplate any other sort? I hardly think so. Indeed, what use would there be for a mortgage, if the case was one, in which the acceptances were to be acceptances founded on effects of the drawer in the hands of the drawee, at the time of acceptance.

And then, if the fact was, that the acceptors had effects of Lewis, out of which they might have paid the drafts, why did he not show the fact? It would have been easy for him

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to do so. And it was a matter in relation to which it was he that held the affirmative.

There is enough here, I think, to raise a *prima facie* case, that the acceptors paid the drafts *out of their own funds*.

Upon the whole, then, I go for affirming the judgment of the Court below.

McDONALD, J. dissenting.

The plaintiff in error executed to Hamilton & Hardeman a mortgage to secure them against certain liabilities which they had incurred on his account prior to the date of the mortgage, and to indemnify them against loss for such acceptances as they might make for him thereafter. The mortgage bore date on the first day of June, 1849. The mortgage had been assigned to the intestate of the defendant in error.

This is a petition and *rule nisi* calling on the mortgagor to show cause why the mortgage should not be foreclosed; and the debts claimed to be entitled to satisfaction from the mortgaged property, are certain drafts drawn by the mortgagor on the mortgagees and accepted by them, bearing date respectively, 31st Dec. 1851; June 3d, 1852; Jan. 10th, 1852; Jan. 13th, 1852; Jan. 27th, 1852; Feb. 12th, 1852; Feb. 21st, 1852; Feb. 28th, 1852.

The mortgagor showed for cause ten objections to the foreclosure. The ninth objection is that the drafts were not given on account of any of the anticipated or future liabilities or indebtedness mentioned in the petition or *rule nisi*, and avers that there was no lien created by the mortgage by reason of said liability.

The tenth alleges that no part of the money claimed to be due was intended to be secured by the mortgage. The Court below overruled all the objections. The plaintiff in error excepted to its judgment and this Court affirms it.

I have the misfortune to dissent from the judgment of the majority. The plaintiff in error does not deny the execution

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of the drafts, and therefore he is not required to file the objection he makes under oath. He does not insist that the drafts, or any of them, as mortgage debts, have been paid in whole, or in part, so that an affidavit of that fact is not necessary. The judgment of the Court below, as understood here, was that, notwithstanding the objections filed and the issue made thereby, the defendant in error was entitled to his rule absolute without proof that the drafts or acceptances, were the debts secured by the mortgage.

The plea, or whatever it may be called, of the mortgagor certainly puts that matter in issue, and the mortgagees, or their assignee, like every other plaintiff, ought to be required to make out his or their case by proof. The mortgage was given for the purpose of securing the mortgagees for sums of money which they had theretofore paid, and which they might thereafter pay for and on account of the mortgagor in discharge or payment of debts and judgments against him, or which he had been or might be enabled to discharge by their acceptances, or other of their means, and to fully indemnify and save harmless the mortgagees from all losses from liabilities by them incurred by acceptances of drafts, checks, endorsements of notes, or by any other notes or means on his account, and from all losses which may happen or accrue from, or in the purchase and sale of cotton, or by any other means where liabilities have been or may yet be incurred by the said mortgagees on account of the said mortgagor in extending aid and credit, or assistance to him in cotton or other trade and operations.

No debt due by mortgagor to mortgagees is described in the mortgage. It is vague and uncertain as to any specific debt or liability of mortgagor to mortgagees. The drafts all bear date more than two years after the execution of the mortgage, and it is not even averred in the *rule nisi* that they are the liabilities against the payment of which, it was intended to indemnify the mortgagees.

My opinion is that it cannot be presumed from the facts

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stated and admitted in the pleadings, and from them we must judge as the case is presented here. I think therefore, that the judgment of the Court below ought to be reversed.

R. LAUGHTER, plaintiff in error, vs. **JOHN BUTT**, adm'r, &c.,
defendant in error.

When the plaintiff in trover begins his petition thus: A. B., administrator &c. of &c., and tenders his letters as his authority to bring the action, if it be not a suit by him, as administrator, (as for myself, I hold it is,) it is clearly amendable, so as to make it such, by prefixing as often as may be necessary, the potent little monosyllable *as*.

Trover, and amendment of declaration, from Union county. Decided by Judge RICE, November Term, 1857.

This was an action of trover, brought by Butt, administrator, &c., against Robert Laughter. The declaration ran in this form: "The petition of John Butt, administrator on all and singular the goods and chattels, lands and tenements, rights and credits that were of Robert C. Laughter, late of said county, deceased, who brings here into Court his letters of administration, and sheweth his authority to sue," &c. It then went on to set out the property sued for, and its value, &c., and the latter part of the declaration proceeded: "to which your petitioner claims title."

The plaintiff moved to amend his declaration by inserting in the early part of it after the words "to sue," "which said letters of administration were granted by the Court of Ordinary of said county." He also moved to amend it by inserting in the latter part, after the word "title," "as such administrator as aforesaid."

Leave was granted to the plaintiff, by the Court, to amend his declaration in these two particulars.

The defendant then filed his bill of exceptions saying, that the Court erred in allowing the plaintiff so to amend his declaration.

MARTIN, for plaintiff in error.

PHILLIPS; MILNER; CHISHOLM & WOFFORD, for defendants in error.

By the Court.—LUMPKIN J. delivering the opinion.

We affirm the judgment of the Court below, allowing the declaration in this case to be amended.

The plaintiff, by tendering his letters of administration as his authority to sue for this property, shows clearly that he claimed it as the property of his intestate, and not in his individual right. The most that can be said then is, that the writ shows a good cause of action, defectively set out. Perhaps, under the strict rules of English pleading, the declaration was amendable; clearly so under the Judiciary Act of 1799, and the statute of 1818; and certainly and most unquestionably so under the broad provision of the *great Act* of 1853–1854.

Judgment affirmed.

J. DOW, *ex dem.*, LAREY J. SIMMONS, et. al., plaintiffs in error, vs. R. ROE, *cas ej.* and JAMES LANE, tenant in possession, defendant in error.

[L.] In ejectment the plaintiff read in evidence a grant to Larey J. Simmons; he then offered a deed from Lacey J. Simmons.

 Simmons et al. vs. Lane.

Held, that this deed, though not following the grant, was admissible under the Act of 1852, prohibiting the Superior Courts from withholding "any grant, deed, or other document from the jury."

[2.] A writing, to serve as a color of title, must, at least, not be one in which the writer disclaims title in himself, and admits title in another.

Ejectment and new trial, from Whitfield county. Tried before Judge TRIPP November Term, 1857.

This was an action of ejectment. At the trial the plaintiff introduced in evidence the grant from the State of Georgia of the lot of land in question to Lary J. Simmons, dated the 14th of August, 1835. Plaintiff then tendered in evidence a deed from Lacey J. Simmons to William Cooper, which was dated the 3d of May, 1837, and in due form.

To the admission of this deed, the defendants excepted on the ground that it did not follow the grant, and that the demise in the declaration was in the name of Lary J. Simmons, and not Lacey J. Simmons. The Court sustained the objection, and refused to admit the deed; and the plaintiffs excepted.

The plaintiffs then closed.

Defendant then proved that Lane and those under whom he claimed, had been in possession of the land for a few weeks over seven years before the commencement of the action, living upon the land and cultivating it.

Defendant then offered in evidence a bond, of which the following is a copy:

"GEORGIA, COBB COUNTY.

Know all men by these presents.—That I, William Y. Hamsell, of the county aforesaid, agent and attorney in fact for Wyatt Meredith, am held and firmly bound unto Samuel H. Keith, his heirs and assigns, in the just and full sum of one thousand dollars; for the true payment of which we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents. Signed and sealed Dec. 17th, 1847.

The condition of the foregoing is such that whereas the above bound William Y. Hansell, agent as aforesaid, has bargained and sold to the said Samuel H. Keith lot of land Number thirty-two in the ninth district and third section of Murray county, State of Georgia, for and in consideration of the sum of five hundred dollars, to him in hand paid by the said Samuel H. Keith, the receipt whereof is hereby acknowledged. Now if the said Wyatt Meredith shall, by the twenty-fifth day of March next, cause to be made to the said Samuel H. Keith good and sufficient titles in fee simple to the said lot of land, then this obligation to be void; else to remain in full force and virtue.

WYATT MEREDITH, [SEAL]

By his agent, William Y. Hansell,

WM. Y. HANSELL, [SEAL]

To the introduction of which bond in evidence the plaintiffs objected on the grounds,

1st. Because its execution had not been proven.

2d. Because no authority was shown constituting Hansell Meredith's agent or attorney in fact.

The defendant then proved by plaintiff's counsel that the instrument was in the hand writing of William Y. Hansell, and the Court received it in evidence without further proof; and to this the plaintiffs excepted.

Plaintiffs then introduced a quit claim deed from Wyatt Meredith to James Bond, dated Feb. 7th, 1852.

Several charges were given to the jury by the Court below, to which the plaintiffs excepted.

The jury found for the defendant.

The plaintiffs moved for a new trial, which was refused, and counsel excepted.

MOORE, for plaintiff in error.

WALKER, and AKIN, *contra*.

By the Court.—BENNING J. delivering the opinion.

The Act of 1802, "supplementary to the Judiciary Act," says: "The Judges of the Superior Courts shall not, in any case whatever, withhold any grant, deed, or other document, from the jury, under which any party in a cause may claim title, except such evidence of title as may be barred by the Act of limitations." *Pr. Dig.* 210.

[1.] This Act, we think, made it the duty of the Court to let the deed of Lacey J. Simmons go to the jury. There is but one way open to the Court, in cases of this sort: to admit the deed, and charge against it. And that has been the way usually taken, when the Act has been relied on for the introduction of irrelevant deeds or documents. If the charge is disregarded, a new trial will be the right of the losing party, almost as a matter of course. Recourse to that Act is a sure thing, in practice. Still, the Act is a law, and every law must be obeyed; an appeal to this Act, therefore, must be respected.

Although, there the grant was to Lacey J. Simmons, and the deed was not from him, but from Lacey J. Simmons, yet the deed, we think, was, under this Act, admissible.

Consequently, we must think, that the Court erred in excluding the deed.

The bond purported to be the act and deed, of both Meredith and Hansell—of Meredith, by the agency of Hansell.

There was no proof that Hansell was authorized to act for Meredith; there was no proof of anything going to show that the bond was the bond of Meredith. It follows, that the bond could not be read as the bond of Meredith, for any purpose.

[2.] The bond was proved to be the bond of Hansell. It shows upon its face, however, that Hansell claimed no title, but admitted the title to be in Meredith. As the bond of Hansell, therefore, it could not serve as a *color of title*. A writing, to serve as a color of title, must, at least, not be one in which the writer disclaims title in himself, and admits title in another.

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The only purpose of introducing the bond was to prove color of title in the tenant. The bond, therefore, was no more admissible as the bond of Hansell, than it was as the bond of Meredith.

Its admission was not claimed under the Act aforesaid, of 1802.

The aid of that Act not being invoked, we think the admission of the bond was erroneous.

What has been said, sufficiently disposes of all the questions in the case.

New trial granted.

DANIEL R. MITCHELL, plaintiff in error, vs. JOSEPH J. PRINTUP, defendant in error.

A new trial will not be granted on the ground of newly discovered evidence, merely to give the party an opportunity to impeach the credit, much less to prove a mistake as to dates, in the testimony of a witness sworn on the trial.

Assumpsit and new trial, from Floyd county. Decided by Judge HAMMOND, August Term, 1857.

Joseph J. Printup brought his action in the Court below, against Daniel R. Mitchell, upon the following instrument in writing:

“ROME, 18th January, 1847.

I hold a note on Bennett Lawrence for \$600, due the 25th day of next December, made payable to me, in which Joseph Printup and myself are jointly interested.

(Signed,) DANIEL R. MITCHELL.”

And also, for \$300, for money had and received by the defendant, to and for the use of plaintiff.

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The facts, necessary to a proper understanding of the judgment of the Court, are set out in the opinion delivered.

AKIN & ALEXANDER, for plaintiff in error.

PRINTUP, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Printup sued Mitchell for \$300. They held jointly a note for \$600 on one Lawrence. Mitchell gave Printup his receipt acknowledging that Printup was joint owner of the paper. Lawrence paid Mitchell the note. Mitchell sold Printup a negro for \$600; and insisting that Printup's interest in the Lawrence note was settled in this way, he pleaded payment, and set-off to Printup's suit. Larkin Barnett swore on the trial, that while Printup was working on the Railroad, he heard him admit that his interest in the Lawrence note was settled in the purchase made of Mitchell. The jury rendered a general verdict for Mitchell. Both parties complained of the finding, each insisting that he had lost \$300. Printup, however, moved for a new trial, on sundry grounds, which we deem it unnecessary to notice, as they have no merit in them; and amongst the rest, upon the ground of newly discovered evidence, which was that he could prove by two witnesses, that Printup got through his work on the Railroad in 1847, when the purchase of the negro, as the bill of sale showed was not made until 1849, two years thereafter; and upon this ground, the Court granted a new trial.

Was the Court right?

A new trial will not be granted on the ground of newly discovered testimony, the sole object of which is to impeach the credibility of a witness sworn on the trial. 9. *Ga. R. 4*. But the evidence in this case does not propose to go so far ven as that. It merely shows that Barnett, the witness, was

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mistaken' in fixing the conversation with Printup in 1847. He may be wrong as to the date, and yet the jury might well believe, that he heard this statement by Printup at some subsequent time. It is many years since this transaction occurred.

We hold therefore, that the Court was in error in granting a new trial in this case.

Judgment reversed.

WILLIAM P. FAIN, plaintiff in error, vs JULIA A. CORNETT, administratrix, &c., defendant in error.

Whenever the question is one of evidence only, and there is room for apprehension that the jury, on account of the ambiguity in the language of the charge, may have been misled in considering and weighing the testimony, it is safest to send the case back for another trial

Trover and new trial, from Gordon county. Tried before Judge TRAPPE, September Term, 1857.

This was an action brought by a son-in-law, against the widow, as administratrix of the father-in-law, for the recovery of certain negroes, which he alleged his father-in-law had given him during his lifetime.

After the close of the testimony, the Court charged the jury, "that if they believed from the evidence that a gift of the negroes had been made by U. D. Cornett, deceased, to the plaintiff, that they should find for the plaintiff; but still, if there was testimony rebutting the proof that a gift of the negroes had been made, they should find for the defendant."

The jury found for the defendant, and the plaintiff moved for a new trial on the following grounds:

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- 1st. That the jury found contrary to the evidence.
- 2d. That the jury found contrary to the law and equity.
- 3d. That there was no testimony to warrant the finding of the jury.
- 4th. That the verdict of the jury is strongly and decidedly against the weight of the evidence.
- 5th. That the Court erred in its charge to the jury, "that if the jury believed from the testimony that a gift of the negroes had been made by U. D. Cornett, deceased, to the plaintiff, that they should find for the plaintiff; but still, if there was testimony rebutting the proof that a gift of the negroes had been made, they should find for the defendant."

The Court refused to grant a new trial, and the plaintiff excepted.

DARNEY; and FAIR, for plaintiff in error.

LONGSTREET & PRINTUP, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This was an action brought by a son-in-law, to recover of the widow and legal representative of his father-in-law, a family of negroes, alleged to have been given to the plaintiff and his wife, by the defendant's intestate.

Considerable testimony was offered on both sides of this case. The verdict was for the defendant, and there was a motion for a new trial upon two grounds.

First, because the verdict was contrary to evidence; second, on account of the misdirection of the Court in its charge to the jury.

As we intend sending this case back, we forbear to express any opinion upon the proof, as we do not wish to influence the finding of the jury upon the proof, upon the next trial.

The Court charged the jury, that if they "believed from the testimony that a gift of the negroes had been made by

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U. D. Cornett," (the father-in-law,) "to the plaintiff, they should find for the plaintiff; but still, if there was testimony rebutting the proof that a gift of the negroes had been made, they should find for the defendant."

The word "rebutting" has a two-fold signification, both in common and legal parlance. It sometimes means contradictory evidence only; at other times conclusive or overcoming testimony. It is possible, nay probable, that the Judge, in his charge, intended to use it in the latter sense; and if we were sure he was so understood by the jury, we would not disturb the verdict. Indeed, had the word *rebutting* but one meaning, we should feel bound to hold that the Judge was properly understood by the jury. But seeing that it has a more restricted definition and use, viz: countervailing or opposing, as well as overcoming proof, and fearing that the jury might have believed that the Court designed to instruct them that if there was any opposing proof, they should find for the defendant, we feel constrained to send this case back for a re-hearing.

Judgment reversed.

PARTHANA KILLIAM, plaintiff in error, vs. DAVID KILLIAM,
defendant in error.

Where the husband and wife separate by agreement, and she takes back as her separate estate, the property which she brought into the marriage, and subsequently, the husband sues for a total divorce, no further allowance will be made to the wife, for her maintenance during the pending of the libel; the Court, however, will, upon application, compel the husband to advance to the wife, money enough to cover the expense of defending the litigation.

Motion for alimony and counsel fees, from Dade county. Decided by Judge TAYLOR, November Term, 1857.

A motion was made in the Court below, on behalf of the plaintiff in error, for alimony and counsel fees, in a case of libel for divorce.

The defendant in error married the plaintiff in error in the month of February, 1855, and they continued to live together till the month of August following, when they separated, the impotent physical and mental condition of the said Parthana having, as the defendant in error averred in his bill, become fully known and manifest. At the time of the separation, by the agreement of the parties, the wife took away with her, property which the husband valued at \$1,200, and after the motion for alimony and counsel fees, executed to her a deed of relinquishment to the same.

The plaintiff in error proved that the defendant in error was worth five or six thousand dollars, and stated that the property taken by her, on the separation, consisted in part of an estate in remainder, not then available, and that a considerable portion consisted of cloth and spun yarn, her own work, and that the property did not amount to \$1,200.

The plaintiff in error excepted to the sufficiency of the deed of relinquishment, on the ground that it was made and filed after the motion for alimony and counsel fees came up for hearing. The Court overruled the objection, and the plaintiff in error excepted.

The Court refused the motion for alimony and counsel fees, and the plaintiff in error assigns the same as error.

HOOPER & TATUM, for plaintiff in error.

JACONY, *contra*.

Killiam vs. Killiam.

By the Court.—LUMKIN, J. delivering the opinion.

This was an application by the wife, who was the respondent in the libel, for alimony and counsel fees.

The parties were married in February, and lived together till August ensuing, when they separated; the husband allowing the wife to take home with her all the property she brought, amounting in value to some \$1,200, he retaining his own, valued at five or six thousand dollars. The husband subsequently sued for a total divorce, on account of both the bodily and mental imbecility of the wife, and she asks for a support pending the action, and counsel fees to defray the expense of litigation.

The view we take of this case is this: When the separation by agreement took place, the wife was content to take back the property she brought into the marriage. She deemed this enough for her maintenance, and we leave her to abide by it. The husband has executed and filed a deed to her in the Clerk's office, for the property, and if it be not valid, it can be made so.

But she did not, perhaps, anticipate a suit for a divorce; and this is an additional expense that she has been forced to incur by the husband; and we hold that an additional allowance should be made, to cover the expense of this litigation, which she has a right to resist; not only to repel the imputation cast upon herself, but to prevent a silly old man from imposing on some other woman, and then impute his own inability to the disappointed but uncomplaining wife.

Judgment reversed.

JOHN L. McMILLAN, et al., plaintiffs in error, vs. LAWRENCE, SMITH & WHILDEN, defendants in error.

- [1.] It is in extreme cases only, that a jury should award twenty-five per cent, the maximum damages known to the law, for a frivolous appeal.
- [2.] The amount of damages to be assessed, in each case, is a question for the jury alone, uninfluenced by the opinion of the Court, touching the matter.
- [3.] In awarding damages, the jury need not be restricted to the particular facts of the case, but may look to the condition of the country, the price of property, the worth of money, &c., and then assess such a per cent. as may seem to them reasonable and just, under all the circumstances, provided they are satisfied, that the appeal was frivolous and intended for delay only.

Damages for frivolous appeal, from Heard county. Tried before Judge HAMMOND, August Term, 1857.

An action was brought on three promissory notes by Lawrence, Smith & Whilden, and a verdict and judgment rendered in their favor, against McMillan and Harvey, who entered an appeal.

When the case came on upon the appeal, the plaintiffs introduced in evidence the promissory notes, and closed. The defendants offered no evidence.

Counsel for the plaintiffs claimed damages against the defendant for a frivolous appeal to the extent of 25 per cent.

The Court made several charges to the jury, which were excepted to by the counsel for the defendants, which exceptions are set out below.

Defendant's counsel in writing, requested the Court to charge the jury:

1st. That the object of the statute allowing damages for frivolous appeals was to remunerate the party injured.

2d. That the jury must be satisfied that the appeal was intended for delay only, before they can find any damages at all.

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3d. Any amount of damages less than 25 per cent., which the jury may think right and proper, will be legal.

4th. That the jury has the right, and may take into consideration the time which the appeal has been standing, in determining the amount of per cent. which they find as damages.

5th. That it is within the legal discretion of the jury to find as damages any amount, they may think sufficient to remunerate the party aggrieved, less than 25 per cent., but not more than 25 per cent.

6th. That the statute allowing damages for frivolous appeals, is in derogation of common law, and must be strictly construed.

The Court refused to charge as requested, and defendants excepted.

The jury found for the plaintiff 25 per cent. damages, and defendants filed their bill of exceptions, assigning as error:

1st. That the Court erred in charging the jury that, if they believed that the appeal was for delay only, and the appeal was without circumstances of mitigation or justification, that in the opinion of the Court they ought to give the highest amount of damages authorized by the statute.

2d. That the Court erred in charging the jury that they might find a less amount; that the amount of damages was discretionary, but if the appeal was for delay only, the defendant was entitled to damages.

3d. That the Court erred in charging the jury, that they had nothing to do with the time the plaintiff had been kept out of his money by the appeal, in making up the amount of damages, only as a circumstance in mitigation of damages; that their legal discretion went only to the amount of damages, if the appeal was for delay only.

4th. That the Court erred in refusing to charge the jury specially and particularly, on the several specifications which defendant's counsel asked the Court in writing to charge, and

particularly the Court erred in refusing to charge and explain fully, what was a strict construction of the statute referred to in the last one of the specifications (above set forth,) when called upon to do so by defendant's counsel.

5th. That the Court erred in charging the jury a second time, that if this appeal was intended for delay only, and there were no circumstances of justification or mitigation that in the opinion of the Court the jury ought to allow the highest amount of damages authorized by statute.

SIMMES & ERSKINE; and BRICKELL, for plaintiff in error.

MABRY, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The only question in this case is, whether the charge of the Court was right, as to the measure of damages, where the appeal is frivolous and intended for delay?

The jury were instructed amongst other things, "that if they should believe that the appeal in this case was made for delay only, and that there were no circumstances of mitigation or justification, in the opinion of the Court, they ought to find the highest amount of damages authorized by the statute."

In the first place, we hold that the Court has no right to express any opinion to the jury, as to the damages they should find in a particular case. It is purely a question for the jury under the law, free from any influence or control from the Court; and secondly, we are clear that the rule prescribed by the Court in this case was wrong. It amounts to this; that in *every* case, unless the appellant shows something to justify or mitigate the appeal, the jury are bound to find twenty-five per cent. damages, or the maximum assessment under the law.

Suppose, as in this case, no plea is filed, the defendant

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confesses judgment at the trial Term ; appeals at that Term, and submits to a final judgment six months thereafter ; and concede if you please, that the appeal was frivolous and intended for delay only ; and yet only twelve months intervenes between the docketing of the case and final judgment on the appeal. Will it do to hold, that the amount of damages must necessarily be the same in such a case, as one attended with great aggravation ? As for instance, where sham or pretended defences are interposed, and all the continuances known to the practice of the Courts are exhausted ? We are sure that our learned brother would be the last to maintain such a proposition. Suppose again, that the debt in one case be founded on an open account, not bearing interest, and the other on a note or liquidated demand, other things being equal, ought not the jury to find larger damages in the former case, than the latter ? We have no doubt of it, because the loss of interest is one of the injuries suffered by the appeal.

Twenty-five per cent. in addition to the lawful interest, is an exorbitant penalty ; and should never be imposed except in extreme cases. Ten is the per cent. allowed for frivolous appeals to this Court, and in assessing damages, the jury should not be restricted in the exercise of their discretion to the facts in proof. They may go out of the record ; and take into consideration the condition of the country, the value of money and the price of property, and everything which goes to enhance the worth of money, and give their verdict accordingly, untrammelled by any opinion of the Court respecting the matter. The framers of the Act designedly intrusted its administration and application to the popular branch of the Court, the jury.

This law has stood on the statute book for near sixty years, and has served no doubt a salutary purpose in suppressing frivolous litigation.

The Court should simply charge the jury in the language of the Act itself. "Gentlemen of the jury, you have heard

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the appeal. If it shall appear to you that it was frivolous and intended for delay only, then it is your duty to assess damages to the plaintiff, who is aggrieved by this delay, for such amount as may seem to you reasonable and just, not exceeding twenty-five per centum on the principal sum, which you shall find due."—*Cobb* 495.

What additional charge or charges, the Courts may be compelled to give, under that bill of abominations, that Judge-trap, commonly ycleped the New Trial Act, and very properly so called; for under its stringent provisions, what case can fail of being sent back for a re-hearing? I repeat, what additional charges may be forced from the Courts, we cannot foresee. But let them keep the words of the Act steadily in view, and they may *possibly* escape the gins and snares set for them by the Act of 1854.

Judgment reversed

WILLIAM J. RUSSELL, plaintiff in error. vs. USIBIOUS SLATON,
defendant in error.

- [1.] The Court is not bound to grant a motion, made in the midst of the trial, to require the Sheriff to execute a deed in pursuance of a sale by a former Sheriff, that took place more than twenty years before; and took place under a *fi. fa.* entered satisfied, "all but 18¾ cents;" the "all but 18¾ cents" being, by interlineation, and in a different ink.
- [2.] A judgment binds only the parties and their privies. Remark as to *Dickerson vs. Powell*, 21 *Ga.*
- [3.] When a man who has been holding land, without a title to it, voluntarily abandons it, the presumption is, that he has not been holding it adversely, but in subordination to the title of the true owner; and, therefore, he can not insist upon such possession, to make out title in him, under the statute of limitation.

Ejectment, from Fayette county. Tried before Judge BULL,
at September Term, 1857.

This was an action of ejectment brought by John Doe, upon the several demises of James McCarcel, W. B. Lambeth, Drury May, Joseph Lambeth, Jephtha V. May and Usibious Slaton, against Richard Roe, casual ejector, and William J. Russell tenant in possession, for lot of land No. 120, in the 7th district of Fayette county, containing 202½ acres.

Plaintiff offered and read in evidence the original grant from the State to James McCarcel, produced by defendant under notice, for the lot in dispute; proved the *locus*, the value of the mesne profits, and closed.

Defendant offered a Justice Court *fi. fa.* against James McCarcel and Sheriff's deed, under that *fi. fa.*, made to John T. Davis. Plaintiff objected to their introduction, because the land was sold by the Sheriff before the grant issued to the drawer. The objection was sustained by the Court, and the *fi. fa.* and deed *admitted as color of title only.*

The defendant then moved the Court for an order requiring the present Sheriff to execute titles to the land in controversy to John T. Davis, who it appeared was the purchaser of said land when sold subsequently by the Sheriff, *after the grant issued*; and proposed, in support of this motion, to prove by the Sheriff in office at the time the land was sold, that the sale was fair and *bona fide*, and that no deed had ever been executed by him to Davis, under the last sale.

The Court refused the motion, on the ground that more than 20 years had elapsed since the sale; and because there was a palpable alteration, with different ink, in the Sheriff's return of 6th October, 1835, and interlineation of the words "all but 18½ cents;" that is, satisfied all but 18½ cents, and that the Court would not stop in the midst of a trial to have titles executed.

Defendant then proved that Davis went into possession of said land soon after the sale in 1835, and continued in possession until the last of the year 1844, during which time he used wood and timber on the place, and exercised acts of

ownership over it; that he owned and lived on an adjoining lot.

Defendant then read in evidence a Sheriff's deed to said lot made under and by virtue of a sale thereof as the property of Davis. This deed was made in 1854 to Russell under a *fi. fa.* in favor of one Jones against Davis and others.

Plaintiff read in evidence a deed from the Sheriff, by virtue of a sale made under a *fi. fa.* against Davis, to William B. Lambeth and Drury May, for the land in dispute—sale made in 1839.

Defendant then proved that John T. Davis, about the time of the last sale, refunded to Jephtha Landrum one hundred dollars, which Landrum had advanced on the land which he bid off as a friend, that Landrum received the money; also proved that the land was worth some eight or nine hundred dollars, and that it sold for something less than one hundred dollars.

Defendant next proved by Jephtha Landrum that he bid off said land at the request and as the friend of Davis; that Clement paid him the money for Davis, which he had paid to the Sheriff; that sometime after the sale, perhaps in 1840, Davis, Drury May, and William B. Lambeth, came to him, and Davis requested him to transfer his bid to them; that May and Lambeth had agreed to advance Davis some five or six hundred dollars and for which, as an indemnity, they were to take and hold the Sheriff's deed to said lot, in addition to a deed from Davis to lot No. 105. That he did not know whether the parties advanced the money or not, they went off to Col. Huie's office to close the business; that he did transfer his bid to them. In 1844 Davis agreed that the titles should vest absolutely in May and Lambeth upon their giving up to Davis two interest notes for about \$75 each, and paying the cost in an ejectment cause which had been pending between the parties; did not know whether the notes had been delivered to Davis or the cost paid, except that he heard the defendant Russell say one of the interest notes passed through his hands to Davis.

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Plaintiff proved by A. McBride that in 1840, William Lambeth applied to him as Sheriff to put him in possession of the land in dispute; that he went with Lambeth, and Davis and Lambeth had some altercation in which Davis objected to Lambeth's having possession; that he and Lambeth went on said lot and he as Sheriff delivered possession to him so far as possession of an unimproved lot could be given.

Defendant proved that Davis continued the same possession and ownership over the lot that he had previously exercised until he removed from the county in 1844.

Defendant next tendered in evidence the record of a case in which the lot in dispute had been levied on under a *fi. fa.* against Davis, and a claim interposed by Usibious Slaton, which claim was tried and the property found subject to the execution, and under which it was sold and purchased by Russell; and proposed to prove that the present suit was commenced, and being prosecuted at the instance of Slaton and for his interest; and that on the trial of the claim case all the title papers of the plaintiff used in that trial were passed upon by the Court and Jury and the land fairly condemned as the land of Davis. All of which was rejected on the ground that it could not be given in evidence as a bar to an action of ejectment.

Defendant then proposed to read the depositions of a witness, which were taken and used on the trial of the claim case; the witness being dead. This evidence was rejected by the Court, as not having been taken in a case between the same parties.

Plaintiff read in evidence a deed from William Lambeth to Joseph Lambeth to an undivided half of said lot, and a deed from L. Glass as executor of Drury May to the other half.

The presiding Judge charged the jury, that the only question in the case was the statute of limitations. That the plaintiff was entitled to recover upon the grant from the State to McCarcel the drawer, unless title passed out of McCarcel, or his right was barred by lapse of time. That the Sheriff's deed

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made before the grant issued did not pass a legal title to Davis, but only a color of title, and for that purpose alone it was admissible in evidence. That if Davis held the land under this color seven years, peaceably, uninterruptedly and adversely, claiming and using it as his own by such open and notorious acts as would be notice to others that he claimed and used it as his own, that would be such an adverse holding as is contemplated by law, and as will make the color a good legal title against McCarcel who failed to assert his right within seven years. But to give such effect to Davis' possession, it must have been uninterrupted. That if Davis abandoned the possession to May and Lambeth, that is such an interruption in his possession as would defeat his statutory title. That if he held in his own right from 1835 to 1840, and then held under May and Lambeth until 1844, it was such an interruption as would defeat his statutory title. And further that if Davis, after holding seven years and then voluntarily abandoned possession, it would destroy his statutory title, and it could not be set up to defeat McCarcel's right to recover.

Defendant's counsel requested the Court to charge the jury that if Davis held adversely for seven years under color of title, he acquired such right and title as might be seized and sold by his creditors, though he may have abandoned the premises afterwards.

The Court refused to charge as requested, but charged, that if Davis abandoned the possession without an intention of returning, his statutory title would be destroyed, and that in this case it did not appear that there were any creditors of Davis at the time he abandoned the premises (provided he did abandon) who could have been affected by it.

To all of which rulings, charges and refusals to charge, defendant excepted.

The jury found for the plaintiff, and defendant tenders his bill of exceptions and alleges as error the rulings, charges and refusals to charge above excepted to.

M. M. TIDWELL, for plaintiff in error.

J. M. Calhoun, *contra*.

By the Court.—BENNING, J. delivering the opinion.

[1.] Was the Court right in refusing to require the Sheriff to execute a deed to John T. Davis? We think so, and for the reasons given by the Court.

Was the record of the claim case, admissible under the proof which the defendant proposed to make. The Court held, that it was not, and we cannot say, that, in this, the Court erred.

The title, according to the plaintiff's proof, was standing, at the time of this decision, in William B. Lambeth and Drury May, not in Slaton. It was not afterwards carried by the proof as far as Slaton, but only as far as Joseph Lambeth. Say, then, that William B. Lambeth and Drury May were, when the decision was made, to be considered as the real plaintiff's in the ejectment, were they bound by the judgment in the claim case? They were not parties to that case; nor were they privies, so far as appears. They therefore, were not bound by the judgment in that case. *Slaton* was the party in that case; and although it might be true, that they let him use their title in support of his claim, still, that did not make them bound by the judgment in the case. If Slaton had gained the case, they might have sued him on their title, their having let him thus use it, to the contrary notwithstanding. So, although it might be true, that Slaton was the party bringing the ejectment; and that he was bringing it for his own "interest," yet, that did not affect the validity of their title, or show that they were bound by the judgment in the claim case. Permitting Slaton to do this, was their business.

[2.] We think, that William B. Lambeth and Drury May were not bound by the judgment in the claim case, and therefore, that the judgment in that case, was not admissible against them.

If the defendant had carried the title, by proof, down to Slaton, and left it in him, then, the case would have been like that of *Dickerson vs. Powell* in 21 Ga. 149.

I remark for myself, in relation to this last case, that I have no remembrance of the fact, that a decision of the point, as to the admissibility of the judgment in the claim case, was made. I do remember well, that Mr. Lyon rested his "case on the other point, and expressed indifference as to this." And the ground taken by the lower Court in rejecting the judgment, was, that the judgment was a *nullity*, not that the case was an action of ejectment, and that in actions of ejectment, such a judgment, even if good, would not be admissible. I simply say, therefore, for myself, that I think this question ought still to be considered an open one.

The Charges.

The charge, "that the Sheriff's sale made before the grant issued, did not pass a legal title to Davis, but only a color of title," is supported by the lessee of *Garlick vs. Robinson* (12 Ga. R.)

But even if this charge was wrong, (and I am disposed to think that it was,) the error is not one that would justify the granting of a new trial. Both parties really claimed under *Davis*, and the title which the plaintiff made out under him was a better one, than that made out under him, by the defendant. So that, the plaintiff is entitled to the verdict, even admitting, that Davis acquired Mr. Carcel's title.

For the same reason, the charge, "that the only question in the case, was the statute of limitation," is not such an error, if one at all, as to call for a new trial.

The charge, "that if Davis abandoned the possession to May and Lambeth, that is such an interruption in his possession as would defeat his statutory title" was manifestly right. If such was the case, the title would ripen, not, in Davis, but, in Lambeth and May.

[3.] The charge, "that if Davis, after holding seven years, then voluntarily abandoned possession, it would destroy his

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statutory title," was also right, we think. If such was the case, the presumption would be, that he had never been holding adversely, but had all the time, been holding in subordination to the true title.

It was not proved, that there were any creditors of Davis at the time when he abandoned the land, if he did abandon it, therefore, *the request* was not justified by the facts.

Upon the whole, we are not prepared to say, that there ought to be a new trial.



Judgment affirmed.

FERDINAND DELONGCHAMP, plaintiff in error, vs. **J. W. HICKS & Co.**, defendants in error.

Bail process is placed in the hands of the Sheriff to execute and return; he arrests the defendant but discharges him without taking bond for his appearance to answer the debt of the plaintiff; he takes an obligation from the friend of the defendant to indemnify and save him harmless in the event of a recovery by the plaintiff, the defendant depositing with that friend the amount of the plaintiff's demand. Plaintiff obtains judgment, and a return of *no property* is made upon the execution. *Held*, that the Sheriff is liable to be ruled for the money.

Rule against Sheriff, from Floyd county. Decision by Judge HAMMOND, at August Term, 1857.

J. W. Hicks & Co. instituted suit against Ferdinand DeLongchamp, and *pending* suit required bail of him; and at the August Term, 1856, recovered judgment for \$90 33, besides cost. Upon this judgment a *fi. fa.* issued and a return thereon made by the Sheriff, of "no property." Application was made after judgment, for summons of garnishment, and Daniel S. Printup served with a copy. The garnishment against Printup was subsequently dismissed, and Hicks &

Co. moved for a rule against the Sheriff to show cause why he should not pay over to them the amount due on the *fi. fa.*

The Sheriff answered, that he arrested defendant on a bail process, *pendente lite*, who deposited in the hands of one Smith, \$100, and Smith gave his obligation to hold and save him (the Sheriff) harmless. Afterwards, Printup took up Smith's obligation and gave his own. He further answered that no *fi. fa.* had ever come into his hands against said DeLongchamp.

Whereupon counsel for the Sheriff moved to discharge the rule on the following grounds :

1st. Because it does not appear that the Sheriff ever had the *fi. fa.* in his hands, by which he could have raised the money.

2d. Because the statute pointed out the mode of proceeding, when the Sheriff fails or neglects to arrest a defendant on bail process and to take security.

3d. Because the Sheriff was not liable under this rule and his answer thereto.

The Court refused to discharge the rule, but made the same absolute, and the Sheriff excepted.

D. S. PRINTUP, for plaintiff in error.

MITCHELL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The plaintiff in error in this case, Ferdinand DeLongchamp, was arrested upon bail process; and having deposited the amount of the debt with one C. H. Smith, the Deputy Sheriff failed and neglected to take bond from the defendant to answer the debt; but took Smith's bond to indemnify and save him harmless; provided the debt was recovered. Afterwards D. S. Printup took up Smith's obligation and substituted his own in its place.

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Right here, we beg leave to say, that while we doubt not that the interposition of the friends of DeLongchamp was prompted by the belief that he was harshly dealt with, still we must say, that it is an interference, not to be countenanced by the Courts, and so far as the arresting officer is concerned, highly reprehensible.

A judgment was obtained against the defendant and a return of "no property" made upon the execution issuing thereon. And now the question is, is the Deputy Sheriff liable by rule for the debt? Some of us think the 50th section of the Judiciary Act of 1799, (*Cobb* 1142,) broad enough to cover this case. It declares that "the Sheriff shall be liable either to an action on the case or an attachment for contempt of Court, at the option of the party, whenever it shall appear that he hath injured such party, either by false returns or by neglecting to arrest the defendant, or to levy on his property, or to pay over to the plaintiff or his attorney, the amount of any sales which shall be made under or by virtue of any execution, or any moneys collected by virtue thereof."

One member of the Court thinks, the neglect to arrest the defendant in this section, means upon final, and not mesne process; especially as the Sheriff and his securities are made chargeable as special bail, under this same Act, for failing or neglecting to take bail, or for taking insufficient bail. But notwithstanding this provision, no one would doubt but that the Sheriff would be liable to suit or action upon his bond, for his failure to take bond in this case; and that the remedy, by making him and securities liable as special bail, is only cumulative. If still liable then to an action, why not to rule, independent of the 50th section, and even at common law, for his contempt of Court in refusing to execute his process in this case. And liable not only *criminaliter*, but to the party injured, just as much so as failing to arrest the defendant upon *ca. sa.*? The proceeding by rule is preferable every way to an action. It is more summary, and therefore more salutary, and yet deprives the officer of no right. The

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party aggrieved must show the injury he has sustained, the same as if he had sued. No wonder the redress by rule is superseding in England, that by ordinary suit. It works better, because more speedy and less expensive, and greatly more efficacious.

We all concur, that under the peculiar facts of this case, the highly culpable conduct of the officer, in refusing to perform his sworn duty, and having the money, if not in hand, at his command, that he is subject to rule in this case. Had he regarded the obligations imposed on him by his oath of office, "that I will faithfully execute all writs, warrants, precepts and processes, directed to me as Sheriff of the county, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of Sheriff, during my continuance in office, and take only my lawful fees; so help me God," the plaintiffs would have got their money long since.

Judgment affirmed.

NANCY GOODWYN, plaintiff in error, vs. NAPOLEON B. GOODWYN, defendant in error.

[1.] The Acts of Congress of 1790 and 1804, prescribing the mode for making the Acts of the Legislature, records, judicial proceedings and exemplifications of office books, in one State, evidence in another, does not abrogate the common law method of proving these documents, but is merely cumulative.

[2.] The Courts in this State have no right to require the production of an original execution from another State. An examined copy, proven in the mode prescribed by law, is sufficient.

Trover, from Coweta County. Decided by Judge BULL, September Term, 1857.

Goodwyn vs. Goodwyn.

This was an action of Trover, brought by Napoleon B. Goodwyn against Nancy Goodwyn, seeking to recover certain negroes.

All the facts necessary to a proper understanding of this case, will be found in the opinion pronounced by the Court. The jury found for the plaintiff, and defendant excepted.

FREEMAN & SIMS, for plaintiff in error.

BUCHANAN & W., *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This is the third time this case has been before this Court; and we regret to see and say, that no trial has been had upon the merits; upon the only issue really involved in the case.

It was first up upon the statute of limitations (16 *Ga. Rep.* 114) and we then held, that upon the proof submitted, the statute did not bar the plaintiff's right to recover. It was again up in 1856 upon sundry points, (20 *Ga. Rep.* 600,) when this Court, at the conclusion of its opinion, took occasion to say: "Here, then, is the hinge upon which this case turns, to-wit: the *bona fides* or *mala fides* of the real or pretended Sheriff's sale; and the further inquiry, of injury or no injury to Napoleon Goodwyn by the acts and acquiescence of his father in the sale and will."

This point has not yet been reached in this case. And until it is, and until it is fully investigated, and all the facts brought out, the result never can be satisfactory to the parties or the country.

This is an action of trover, brought by Napoleon Goodwyn, the son, against Nancy Goodwyn, his mother, for sundry slaves. The plaintiff deduces his title from the will of Mrs. Elizabeth Goodwyn, his grand-mother, and the recovery is resisted upon the ground, that the title to this property was never in the testatrix, and this is the issue between the parties.

The evidence shows that these negroes were once the property of Burwell Goodwyn, the son of Elizabeth, the father of Napoleon and husband of Nancy Goodwyn. Enough is disclosed to show that these slaves were sold under execution at the instance of one Stephen P. Pool, against Burwell Goodwyn, or Ethereal Crowder, assignee of Burwell Goodwyn and Stephen P. Pool, (or Ethereal Crowder, assignee of Stephen P. Pool against Burwell Goodwyn and said Stephen P. Pool, for the case is thus variously stated in the bill of executions,) in the State of Virginia, in the year 1829 and bid off by one Skepeth M. Oliver. The negroes probably never changed possession, but remained in the possession of Burwell Goodwyn, after, as before the sale. And the object of the testimony should be, to ascertain how the title to this property got into Mrs. Elizabeth Goodwin, so as to enable her to will it to her grand-son? Was anything paid for the negroes? If so, by whom and to whom? Did Oliver bid off the property for himself or for some one else? He is said to be alive; why is his evidence not taken? Wm. M. Gill, the Deputy Sheriff who sold the negroes, is alive, and his testimony has been taken and shown to have been read; but it does not go far enough. It is silent as to the amount of Oliver's bid, the payment of the purchase money, the presence of the negroes at the sale, the delivery of the property, the execution of a title, &c. &c. This ex-official should be carefully and closely examined, touching anything that would cast light upon the character of this sale.

The ground upon which we put the judgment of reversal in this case is the exclusion of the testimony of Thomas D. Goodwyn. He was held to be an incompetent witness, 1st, on the score of interest; and 2d, because it was proposed to prove by him the record from Dinwiddie county, Virginia, as at common law.

We think the Court erred in both views of this evidence.

1st. As to the interest of the witness. Thomas D. Goodwyn, it is true, is the son of Burwell Goodwyn, deceased

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But the estate of Burwell Goodwin is not before the Court. It does not appear that he will be gainer or loser by the event of *this suit*. One thing is certain: in a suit by the administrator of Burwell Goodwyn to recover these slaves either from Napoleon or Nancy Goodwyn, the judgment in this case cannot be given in evidence in that. Were such an action pending, it is by no means certain that Thomas D. Goodwyn might not be sworn as a witness. Suppose the estate of Burwell Goodwyn to be insolvent, as it probably once was, if not so at the time of his death, and if not so now, a nominal distributee, might be a witness. At all events, the interest of this witness is too remote and contingent to render him incompetent.

[1.] 2d. As to the right of the defendant to read the record upon common law proof, the authorities, with a single exception, are all that way. The first section of the fourth article of the Constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof." *Cobb*, 1106. And the Acts of Congress of 1790 and 1804, *Cobb* 2756, passed to give effect to the Constitutional provision, merely declares that the Acts of the Legislatures of the several States, their records and judicial proceedings, as well as all records and exemplifications of office books kept in any public office of any State, and authenticated in the mode therein prescribed, shall have such faith and credit given to them in every Court, as they have in the Courts of the State from which they are taken. In other words, a convenient method is prescribed for making these documents evidence. But these Acts do not profess or pretend to make this the only mode of proving these records. They do not abolish the common law rule. 12 *S. and R.* 203; 2 *Yeates* 532; 1 *Haywood* 359; 2 *ib.* 173; 3 *Leigh*, 816, 817.

I have been informed by one of the Judges of the Supreme Court of the United States, since this case was decided, that, owing to the numerous forgeries perpetrated in land titles in California, they had been driven to the common law mode of proof as a protection against fraudulent conveyances.

[2.] We think the Court erred in ruling out the testimony of the Deputy Sheriff, Gill. The original execution, of course, under which the sale took place, could not be removed from the office where it was filed, and to which it belonged, in the State of Georgia.

As to all the quibbling in the Court below over scraps of testimony referring to a sale, &c., we have neither the time nor the taste to examine it. Let the case be tried, and tried finally upon its merits.

Judgment reversed.

NEWTON S. HAWKINS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] On a trial for murder, it is not competent, in order to reduce the homicide to manslaughter, to ask a witness if, from the conduct, countenance and language of the deceased, he did not believe it was his intention to kill the prisoner? The witnesses must testify to facts, and not give their opinion.

[2.] Provocation by threats will not be sufficient to reduce the crime from murder to manslaughter, where the person killed is unarmed, and neither making or attempting any violence upon the prisoner, at the time of the killing.

[3.] If sufficient time has elapsed for reason to resume her sway, the killing will be attributed to deliberate revenge, and punished as murder.

[4.] Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

Murder, from Gordon county. Tried before Judge TRIPPE, September Term, 1857.

The plaintiff in error was tried and convicted in the Court below, of the murder of Absalom W. Scott. The facts of the case, as appeared by the evidence, were as follows:

Hawkins and Scott were gambling in a crib in the yard, when some altercation ensued, which ended in a fight; Hawkins got out of the crib and gathered up some rocks or brickbats; Scott told Hawkins to lay down the rocks, and he would come out; Hawkins laid them down, but Scott remained in the crib; Hawkins then took a stick and went up to the door of the crib and struck at Scott, and "punched" at Scott with the stick through the cracks of the crib; Hawkins then took some rocks and threw them at Scott in the crib; after throwing the rocks, Hawkins left the yard and went to his house, some 250 yards off; Scott said that Hawkins was too mean to live in the county, and that he intended to kill him; just as Scott said this, Hawkins was coming towards him, and was about 24 steps from him; Hawkins had a horse pistol in his hand, and when he came within about 10 feet of Scott, he raised it and shot him; the shot took effect in the left breast of Scott, who fell dead, moving only three or four steps. The witnesses stated their belief that Hawkins was sufficiently near to hear the threat of Scott to kill him.

Defendant's counsel proposed to ask two of the witnesses whether, from the conduct, countenance and language of the deceased, immediately preceding the homicide, they (the witnesses) believed the deceased intended to kill the accused. On each occasion the Court refused to allow the question to be put, to which refusals the defendant's counsel excepted.

The cause being closed, the Court charged the jury, (*inter alia*,) "that if they (the jury) should find, that between the provocation given and the killing, there was sufficient time for the voice of reason and humanity to have resumed her sway, whether in this case she had done so or not, the killing was murder, and not manslaughter." To which charge defendant's counsel excepted.

The jury found the defendant guilty of murder.

Defendant's counsel moved for a new trial, on the ground of error in the rulings and charge above excepted to. This motion the Court refused, and the defendant's counsel filed his bill of exceptions, assigning the same as error.

WALKER & FRANCIS, for plaintiff in error.

Sol. Gen. LONGSTREET, for the State.

• *By the Court.*—LUMPKIN J. delivering the opinion.

It seems in this case, that prisoner and deceased were gambling in a crib; a quarrel and fight took place; Hawkins came out and threw stones or brick-bats at Scott, and punched him through the cracks of the crib. The last stone thrown was supposed to have hit Scott, as he did not speak afterwards. Hawkins then left for his house, saying he would be back in a little while; Scott came out, and was standing with the witness Baldwin, when Hawkins returned with two horseman's pistols in his hands, loaded with buck shot; when he got within 23 or 24 steps of Scott, Scott remarked that Hawkins was too mean to live, and that he intended to kill him; witness does not know whether Hawkins heard this remark, but thinks he might have heard it; Hawkins fired and killed Scott, eight of the shot taking effect; and upon this testimony he was found guilty of murder by the jury.

A new trial was moved for on two grounds. First, because the Court refused to allow defendant's counsel to ask the witnesses, who were present at the killing, whether, from the conduct, countenance and language of the deceased, immediately preceding the homicide, they believed deceased intended to kill the accused. Second, because the Court charged the jury, that if they should find, that between the provocation given and the killing, there was sufficient time for the

voice of humanity to have been heard, and reason to have resumed her sway, whether in this case the fact was so or not, the killing was murder, and not manslaughter.

The application was refused, and to reverse this judgment this writ of error is prosecuted.

[1.] Was the Court right in refusing to allow the witnesses to testify as to their belief, as to what was the purpose and intention of Scott?

In *Hudgins vs. The State*, 2 *Kelly's Rep.* 173, this Court held, that the opinion of a witness, as to the intention of the deceased in approaching the slayer, is not admissible. The same rule is laid down in the case of *The State vs. Scott*, 4 *Iredell's Law Rep.* 409. The Court say, "the belief that a person designs to kill me, will not prevent my killing him from being murder, unless he is making some attempt to execute his design; or at least, is in an apparent situation to do so; and thereby reasonably induces me to think that he intends to do it immediately."

Here, there was certainly no such purpose in the mind of the deceased, as he had no weapon of any sort. Prisoner must have known that Scott was unarmed. The witnesses were not asked, if they thought that Scott intended to kill Hawkins, at the time of the homicide? To such a question there could have been but one answer.

[2.] As to the charge of the Court, it was in the terms and language of the code. See 4 *Division, Section 7, Cobb's Digest*, 783-4. Provocation by threats will not be sufficient to free the slayer from the guilt of murder. And if sufficient time has elapsed for reason to resume her sway, the killing shall be attributed to deliberate revenge, and punished as murder. Here, the menaces were evidently made after Hawkins had determined to kill Scott, for they were made after he returned from his house with deadly weapons; and it was very doubtful whether the words of Scott were heard at all by Hawkins. They were addressed to the witness, and

not to Hawkins. See *Russell on Crimes*, 433, 442, and the authorities there cited; *Wharton's American Crim. Law*, 375, 377; *Roscoe's Crim. Ev.* 724, 729, 730, 731.

But what provocation was given in this case, to justify the uncontrollable passion, relied on in this case, in mitigation of this homicide? Hawkins seemed to have got the best of the fight in the crib; he continued to assault Scott after he came out; he left him in the crib, hastened home, a distance of 250 yards, procured his pistols, returns and executes his murderous purpose, evidently formed before he left Scott. It will never do to tolerate such a plea, I had almost said, pretense; no, never. *Ray vs. The State*, 15 *Ga. Rep.* 244, 245.

Human life is sacrificed at this day, throughout the land, with more indifference, than the life of a dog, especially if it be a good dog. Scott may not have been a good citizen, still he was a human creature, under the protection of the laws of the State; and even in his person, the punitive power of the government must be vindicated. Cain was the first murderer, but who is the last, is known only to those who have read the morning papers. If this crime goes unpunished, let our skirts, at least, be free from the stain of blood-guiltiness.

Judgment affirmed.

NOTE.—This opinion was delivered at the opening of the Court in the morning. At noon, Judge L. picked up the *Augusta Chronicle & Sentinel* of that day, and the following was the first article which arrested his attention:

"FATAL ACCIDENT.—The West Point Citizen of Saturday says:—We learn that a Mr. Brawner, a teacher by occupation, was fatally stabbed on last Monday evening, by one of his students only twelve years old. The circumstances connected with this case are as follows: While the boys were at play, during recess, Mr. Brawner heard the little boy making use of profane language; he addressed the boy, William Collins, and asked him what he said. The lad repeated the oath; whereupon, the teacher said to him, 'William, come into the house, and I will settle with you.' The lad walked to the school room, and while on the way, report says that a larger boy said to William, 'if he attempts to whip you, stick your knife in him.' Mr. Brawner struck him once or twice with a switch; William returned the blow, and made his escape by running off. Mr. B. ran after him some distance, and on his return was observed to fall several times. He died from a stab received in the left breast, before reaching the school house.

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"We learn that Mr. Brawner was raised near Elberton, Elbert county, Georgia. He was an estimable young man, beloved by all who knew him, and was a particular favorite with William's parents, as he had been chief attendant at a wedding party only four days previous to his death, at the marriage nuptials of William's sister. This said accident occurred near Berlin, Chambers county, Alabama."

WILLIAM HOPKINS, plaintiff in error, vs. **LAZARUS TILMAN**,
defendant in error.

When the question is one of fact purely—the soundness or unsoundness of the property at the time of sale—and the case has been fairly submitted to the jury, their verdict will not be disturbed.

Action for breach of warranty, from Merriwether county,
tried before Judge **BULL**, at August Term, 1858.

This was an action by William Hopkins against Lazarus Tilman, to recover damages for breach of the warranty of soundness of a negro woman slave, sold by Tilman to plaintiff.

The defendant pleaded the general issue.

The plaintiff offered and read in evidence the bill of sale, which was as follows:

"Received, December 31st, 1853, of William Hopkins six hundred and fifty dollars in full payment for a negro woman named Catharine about seventeen years old, the title to which negro I bind myself, my heirs and executors, and warrant to be sound except being deaf and a small old hurt on the hand. I warrant to be sound in body and mind.

(Signed,)

LAZARUS TILMAN.

Walton Ector, For the plaintiff, testified that he knew the girl when about 13 years old; she was sold as the property of M. D. Ector, considered the girl an inferior negro but healthy, she was a dull negro.

Dr. Joseph T. Reese, examined by commission, testified, that he practiced medicine in the family of defendant, and was called to see a negro girl named Catharine, did not think she was afflicted with any disease when he saw her, was called to see her in the Spring or Summer of 1853 or 1854, as well as remembered; thought the girl was practicing a deception on the family of defendant and treated her accordingly. It was the only time he ever saw her; has no idea of her worth. She was lying quietly on the bed in a natural position and condition as far as witness could judge.

Dr. E. C. Hood, testified, that he was a physician, and in the spring of 1854, was called to see the woman and found her in a stupid, comatose condition, with laborious respiration; pupils of the eye dilated; after watching her symptoms about an hour and using means to restore her to consciousness, she became rational or partially so, and he gave her a cathartic and left her. Judging from the symptoms and the history of the case had little or no doubt but that the negro had had a fit? Does not know whether the case is of long or short standing. *Cross examined.*—The causes of fits are very numerous, and the cause is frequently so obscure that we cannot detect it; is not prepared to say as to the curability or durability of this case; has seen the negro only a few times.

Milton and Zimmerman Hopkins, examined by commission, for plaintiff (to 1st set of interrogatories) say they know the woman Catharine bought by plaintiff of defendant. She was not in good health at the time of purchase, did not understand the nature of her disease at that time. She had her first fit, after we knew her, about the last of February 1854, since that time she has had four other fits, she also has spells of sickness once a month.

Cross examined.—Are not physicians; the disease remains about the same as it was when they first knew her; do not consider the girl worth the money that plaintiff paid for her.

To 2d interrogatories January, 1857. They knew the girl since plaintiff bought her from defendant—has had fits ever since; she has about two fits every month, and is usually confined by sickness about five days in every month; suppose her sickness caused by the fits, have been sworn before in this case; the negro's health has gradually become worse since they were sworn before in this case, her fits are more severe and her sickness more protracted, her mind also is more impaired.

Cross examined.—They are the sons of plaintiff.

William Hood, examined by commission for plaintiff, testified that he knew the girl Catharine; plaintiff sent for him in May 1854, he went over and went into the field, where plaintiff and the girl were. She was lying on the ground speechless, he supposed with a fit, and in 15 or 20 minutes he assisted plaintiff in removing her to the house, without any effort on her part, and laid her on a pallet, and in a few minutes left.

Cross examined.—Is not a physician and does not know what plaintiff gave for her.

Calvin Spence, proves a tender of the negro to defendant, and that plaintiff at the same time offered defendant \$75, to take her back, which he refused to do. This was the last of May 1854.

Cross examined. Was present when plaintiff tendered the negro back, as he considered her unsound—having fits, to which defendant replied “she did not have fits” and he refused to take her back.

The plaintiff closed, and defendant introduced no testimony. The jury returned a verdict for the defendant: plaintiff moved for a new trial on the ground that the verdict was contrary to law and evidence.

The Court overruled the motion for new trial, and plaintiff excepts.

HALL; and RAMSEY, for plaintiff in error.

B. H. HILL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

. The only question in this case is was the verdict of the jury, so strongly and decidedly against the weight of evidence as to constrain the Superior Court to grant a new trial, and this Court to reverse its decision in refusing to order a new trial, as a flagrant abuse of its discretion? We think not.

It does not satisfactorily appear, that the unsoundness of the negro existed at the time of sale. It *may* have been brought on afterwards. Had the verdict been the other way, we should not have felt compelled perhaps to disturb it. Neither do we as it is. The case was fairly submitted, and the jury were fully competent to weigh the testimony, as they doubtlessly did.

Judgment affirmed.

LLOYD & PULLIAM, plaintiffs in error, vs. WRIGHT, GRIFFITH & Co., Defendants in error.

So long as the buyer continues to have a right to object either to the quantum or the quality of the goods, there has been no acceptance and receipt within the meaning of the statute.

Complaint, from Fulton county, tried before Judge BULL, October Term, 1857.

An action was brought in the Court below by the defendants in error, against the plaintiffs in error, to recover \$120 upon an open account for cigars sold and delivered. To this action

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the defendants pleaded, that the contract to pay the \$120 (if ever made) was obnoxious to the 17th section of the statute of frauds, no earnest to bind the contract having been given, nor part payment made or note or memorandum entered into.

Upon the trial of this issue the plaintiffs offered in evidence, the testimony of Jacob H. Wright and Edward Hyatt taken by depositions, going to prove the contract. To the reception of this testimony, the defendants objected on the ground that the contract sued on was within the 17th section of the statute of frauds, and the evidence offered did not take it out. The Court overruled the objection and admitted the evidence and defendants excepted.

Counsel for the plaintiffs having closed, the defendants, counsel moved the Court to dismiss the case on the ground that the contract sued on, which was an open account for cigars, sold by the plaintiffs, residing in the city of Baltimore, to the defendants, residing in the city of Atlanta, upon a verbal order was void under the 17th section of the statute of frauds. The Court overruled the motion and counsel for the defendants excepted.

The jury found a verdict for the plaintiffs for the amount sued for, and the defendant's counsel filed his bill of exceptions, assigning the above rulings of the Court as error.

GARTRELL & GLENN, for plaintiffs in error.

T. L. COOPER *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Under the proof, was this case within the 17th section of the statute of frauds?

The statute requires that the purchaser should "actually receive" the goods. And although goods are forwarded to him by a carrier by his direction, or delivered abroad on board of a ship chartered by him, still there is no actual acceptance

to satisfy the act, so long as the buyer continues to have the right, either to object to the *quantum* or quality of the goods. *Chitty on Contracts*, 392 ; *Story on Contracts*, 381, 382, 383 ; *Acebal vs. Levy*, 10 *Bingham*, 376 ; *How vs. Palmer*, 3 *B. & A.*, 321 ; *Lloyd & Pulliam vs. Wright, Griffith & Co.*, 20 *Ga. Rep.* 574.

The case of *Dutton*, 3 *Bos. & Pull.* 582 ; relied on by counsel for defendant in error was a mere question, as to what constituted a good delivery ; the statute of frauds was not in the case. It consequently does not meet the question now presented. The decision there was, that a delivery of goods by the vendor, in behalf of the vendee, to a carrier, not named by the vendee, was a delivery to the vendee. That is, it was a good delivery to bind the contract, but not a sufficient delivery to take the case out of the statute of frauds, which requires, that the goods should be "actually received" to come within the meaning of the statute.

Judgment reversed.

SAMUEL OLIVER et al., plaintiffs in error, vs. **AMOS A. WILLIAMS**, defendant in error.

Where the defendant in ejectment takes another person on the land in dispute, rents him the premises, and after nailing up the cabin, the only building on the place, they retire together, charging the witness not to disclose the transaction ; is the possession changed ? *Quere ?* Clearly it is not, if the whole affair be colorable only, and intended to avoid a suit at the instance of the plaintiff against the defendant as tenant in possession.

Ejectment and nonsuit, from Catoosa county. Decided by Judge TRIPPE, October Term, 1857.

An action of ejectment was brought by the plaintiff in error, to recover a lot of land from the defendant in error.

Upon the trial, the plaintiff, after the production of certain documentary evidence, introduced the following witnesses:

Gray B. Lassiter, who testified, that in March, 1853, he went with McCutchin, the attorney of Samuel Rawlins, to see Amos A. Williams; McCutchin told Williams that he had come about the lot of land in question, in this suit, and asked Williams whether he was in possession of the lot; that if he was, he McCutchin should sue him. Williams replied, "Mac, I have nothing to say, you can exercise your own discretion."

Elijah Fitzgerald, testified, that he knew the lot of land that Williams was in possession in 1846 or 1847, and had either himself or by his tenants, continued in possession ever since.

In February 1853, Williams and Lively sent for witness, when they all went on the land together, and Williams put Lively in possession of it, having rented it for the year for \$25. Defendant Williams is now in possession of the land. Joel Barnes went into possession of the lot of land in March, but was put out and Lively took possession as Williams' tenant.

Joel Barnes, testified, that he entered on the land in March, 1853, as tenant of Samuel Rawlins. He was arrested and taken to town, and when he returned, his family and furniture had been turned out, and Williams was in possession of the lot.

Michael Dickson, testified, that the defendant Williams was on the land in 1839, and by himself or his tenants was in possession of and claimed the land as his own. Thomas Strickland as tenant of Williams, was in possession in 1852. Defendant Williams had cut and carried off from the lot considerable quantity of wood.

Thomas Brock, testified that soon after Barnes was turned out of possession in 1853, he was sent for as he was told by

Lively, and Lively and the defendant hired him to take possession of the lot. Williams claimed the land as his own. He (witness) was hired to take possession of it, to keep Rawlins from getting it.

Plaintiff then closed.

Counsel for the defendant then moved the Court for a nonsuit, on the ground that there was no evidence that the defendant was in possession of the land at the time of the commencement of the suit.

Plaintiff's counsel insisted that there was such evidence, and that the plaintiff had the right to have the question of possession submitted to the jury.

The Court refused to submit the case to the jury, and granted a nonsuit, and to this decision of the Court, the plaintiffs excepted.

AKIN, appeared for the plaintiff in error.

HOOPER & WALKER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The only question in this case is, whether there was evidence offered by the plaintiff, as to the possession of the defendant at the time the action was brought, to take the case to the jury? The Court below held there was not; and granted a nonsuit, and that is the decision complained of.

There had been a previous suit between the same parties, respecting the same land, which was dismissed, October 1852. The present action was filed the 2d and served the 3d day of March, 1853; and the state of the facts existing at that time, was these: Williams, the person contesting the title of the plaintiff, had been claiming the land for years before the first case was commenced in 1844, and after that time. But acting probably under legal advice, he deemed it important not to be in the actual possession of the premises for the

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next six months after the first case was dismissed, inasmuch as the plaintiff was compelled to renew his suit within that time, or forfeit his right to do so afterwards. Williams therefore takes one Absalom Lively to a cabin which was the only building on the place, rents him the land for the year 1853, for twenty-five dollars, the door is nailed up, and the parties retire together; the witness being charged not to divulge the transaction.

On the 4th of March, 1853, Barnes the tenant of the plaintiff, goes to the house, lifts the door off the hinges, takes possession of the empty hut, not even finding the few old clothes that had been put there by Lively. Barnes remained until his crop was nearly made, when he was turned out by the joint act of Williams and Lively.

Under these circumstances, did the premises ever change possession, even if the contract between Williams and Lively had been *bona fide*? But if the arrangement was colorable only, and the jury had a right to find from the proof that it was, and likely would have so thought; then it is quite clear to our minds that the possession of Williams never was changed. This question, at any rate, should have been submitted to the jury, with a suitable charge from the Court, as to the law of the case.

Judgment reversed

ISAAC THURMAN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The Act of 5th March, 1856, establishing a Criminal Court in the City of Atlanta, and authorizing a bill of indictment, in case of misdemeanors, to be found by nine Grand Jurors, not unconstitutional.

Certiorari, from Fulton county. Decided by Judge BULL, October Term, 1857.

The facts of this case are stated in the opinion pronounced by the Court.

HAMMOND & SON, for plaintiff in error.

SOL. GEN'L, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

On the 5th of March, 1856, the Legislature passed an Act, to organize and establish a criminal Court in the cities of Columbus, Macon, Atlanta and Rome, and to define its jurisdiction.—See *Pamphlet Acts* 240.

By the 7th section of this Act, it is *provided*, that no Grand Jury shall consist of less than twelve, nor more than fifteen persons; but that nine may find a bill, or make a presentment. Isaac Thurman having been indicted under this Act, and found guilty of a misdemeanor by the trial jury, excepted to its constitutionality. His objection being overruled, he *certiorated* the proceedings of the city to the Superior Court, where the decision of Judge WHITAKER was sustained by Judge BULL, and to reverse this judgment, this writ of error is prosecuted.

The position taken by counsel for the accused is, that the Act of the Legislature in allowing an indictment to be found by nine instead of twelve Grand Jurors, violates the 5th sec. of the 4th Article of the State Constitution, which declares, that trial by jury as heretofore used in this State, shall remain inviolate.—*Cobb* 1125. And he seeks to establish his proposition by showing, that both at common law, and all the previous Constitutions and Judiciary Acts in this State, from 1777 to 1798, twelve men were necessary to find an indictment; and that consequently, that clause of the State Constitu-

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tion, which has been cited would be infringed, were an indictment allowed to be found by a less number than twelve.

Concede all that the counsel contends for in this case, whose researches are so creditable to his industry, still there is another view of this question, which relieves it entirely from the Constitutional difficulty.

By the 1st section of the 3d Article of the Constitution, the Superior Courts have exclusive jurisdiction in all criminal cases, as relates to free white persons, except for minor offences, which do not subject the offender to the loss of life, limb or member, or to confinement in the Penitentiary. In all such cases, Corporation Courts such as now exist, or which may hereafter be constituted in any incorporated city, being a seaport town and port of entry, may be vested with jurisdiction to try such minor offences, under such rules and regulations as the Legislature may hereafter by law direct.—*Cobb* 1121. And by a subsequent amendment of the Constitution, the foregoing words “being a seaport town and port of entry,” are stricken out.—*Pamphlet* 1853, 1854—so that the jurisdiction over minor offences is given to all incorporated towns, under such rules and regulations as the Legislature may direct.

In the case before us, the Legislature in the legitimate exercise of the powers thus specifically conferred, have provided that for misdemeanors like the one which brought up this case, committed in the city of Atlanta, the same being an incorporated town, nine persons might present or find a bill of indictment. It was competent for the General Assembly, in the establishment of this Criminal Court, under the amended Constitution, to have dispensed with this preliminary investigation altogether, and put the party at once upon his trial. Perhaps, they may, have dispensed with a jury altogether, why not? *A fortiori* was it competent for them to have passed this Act, diminishing the number of grand jurors necessary to find a true bill.

Judgment affirmed.

A. P. DEARING, plaintiff in error, vs. W. H. THOMAS, defendant in error.

[1.] Under the Act exempting house and lot not exceeding a certain value in a city or town from levy and sale in payment of debts, and a house and lot of greater value being owned by the debtor, a sale may be made, and a sum of money may be allowed the debtor from the proceeds of sale, equal in amount to the specified value of property exempted by the Act from sale, as an equitable mode of partitioning.

[2.] The removal of the defendant from the house and lot, does not subject it to the payment of a debt, if it be otherwise exempt.

Claim, from Lumpkin county. Decided by Judge Rice, February Term, 1858.

This case came on in the Court below upon a *rule nisi* against the Sheriff, requiring him to show cause why he did not pay over to Thomas, his agent or attorney, \$200, arising from the sale of his (Thomas') property under an execution from the Superior Court, in favor of Dearing. The claim was made under the statute exempting certain property from levy and sale.

A statement of facts was agreed upon by the counsel, to the effect that a portion of the defendants family was in possession of the property at the time of the levy; that the defendant was a Methodist traveling preacher residing in Hawkinsville at the time of the levy. At the time of the sale, the defendant had gone out of possession, but his agent (a son) was in possession. At the time of hearing the motion, the defendant had moved into the Florida Conference, a part of which is in Georgia. That the House and lot sold were in the village of Leathersford, in Lumpkin county. The Sheriff was notified by the defendant's attorney at the time of the sale, that the defendant would claim \$200 under the Insolvent Law.

Plaintiff moved the Court, if it should be of opinion that defendant could draw the money at all, that it should order that the same should be invested within the jurisdiction of

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the Court, so that if defendant ever became solvent, plaintiff could have the benefit of the fund.

The Court ordered \$200—money raised on the said property—to be paid the defendant without restriction, and plaintiff excepted.

JOHNSON, appeared for plaintiff in error.

WEIL, and BORD, for defendant.

By the Court.—McDONALD, J. delivering the opinion.

[1.] This cause was heard and determined at the February Term of the Superior Court of Lumpkin county, 1858. It seems, from an agreement of the counsel, not referred to in the foregoing statement of the case, that the sale of the property from which the money was raised, which gives rise to this contest, was made in October, 1857, under an order of Court passed at the previous August Term. It does not appear in the Record why it was that the Court passed this order. It may have been on some dispute or issue in respect to the value of the property in the defendant's possession, and for the protection of the levying officer. This Court has decided, that it is not necessary to give notice and have a survey made in cases where the land levied on is less than the quantity exempted by the statute; and in another case, that, as the law exempts one horse of the value of fifty dollars from levy and sale, and the defendant has but one horse, and his value exceeds fifty dollars, he shall be allowed fifty dollars from the proceeds of sale to purchase a horse of that value. *Moultrie vs. Elrod*, 23 Ga. This equitable construction of the Act may be well applied to a town lot which cannot be so partitioned as to allow the debtor his rights under the exemption Act; and we will not interfere with the judgment of the Court below on that assignment of error. The order at August Term for the sale of the land, may have been predicated on the said decisions.

A defendant is entitled, by the Act, to own, hold and pos-

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sess the property exempted. It is not pretended that the defendant owned property at Hawkinsville, whither he had removed, or elsewhere, except in the village of Leathersford. If he owned it, and it was all he owned, his removal to another place not owned by him, did not remove it from the operation of the Act. He could not have sold the land without the consent of the wife, who must, of her own free will and choice, have signed the deed with him. He could not, by a removal, destroy her right. The profession of the defendant, an itinerant Methodist clergyman, shows that he could have no permanent home. His calling was abroad, and his high duties necessarily carried him from his family; but that is no reason why he and they should be placed out of the protection of this humane law. The creditor cannot complain, for he contracted under the law exempting a certain portion of the debtor's property from levy and sale. It was his contract that so much of the debtor's land, or house and lot, as amounted to the sum specified in the Act, should not be disturbed by the debt. The judgment of the Court below must be affirmed.

Judgment affirmed.

WILEY P. DICKERSON, plaintiff in error, vs. A. T. BURKE, defendant in error.

[1.] A tax execution levied on tract of land No. 224 in the 5th district of Carroll, is no evidence to support a sale of the same number in the 3d district, and is inadmissible for that purpose.

[2.] A promissory note, on the face of it joint and several, but signed by but one maker, who puts it in circulation, is good against him.

[3.] It is to be presumed that a note transferred, was transferred before due, and that the holder is a *bona fide* holder for value, and in such case, the note itself is evidence of no notice of a defence except such as may appear on the face of it.

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[4.] The holder is not bound to prove that he gave value for it, unless it be first established that the note was lost or stolen.

[5.] Counsel have no right to argue before the jury points to which there is no evidence.

Assumpsit, from Carroll county. Tried before Judge HAMMOND, October Term, 1857.

The facts of this case are fully stated in the opinion of the Court.

GLENN, and LATHAM, for plaintiff in error.

BURKE & MABRY, *contra*.

By the Court—McDONALD, J. delivering the opinion.

The defendant in error sued the plaintiff in error in the Court below, on a promissory note in the following words: "By the 25th Dec., 1855, we or either of us promise to pay James B. Goddard or bearer 864 17-100 dollars, value rec'd., the above Goddard agrees to pay out of the said note, the expenses of a law suit, if any occurs in good faith, about the land this day sold by the said Goddard to the makers of this note, between this day and the time the note falls due; the land is lots No. 224 and 223, in the 3d district of Carroll county, Ga., this 31st May, 1854. [signed]

WILEY P. DICKERSON."

The defendant pleaded the general issue, and that the title to one of the lots (No. 223) has wholly failed. That since the note was given, the said lot has been sold for taxes by an execution against Goddard, to which it was subject and liable; that the title to half of the other lot was not in the said Goddard, but in another person, and wholly lost to defendant, and that plaintiff had notice, &c.

[1.] A tax *fi. fa.* against Goddard for his tax for the year 1854, levied on lot of land 224 in the 5th district of Carroll, was tendered in evidence and objected to by plaintiff, on the ground that the land levied on was neither of the tracts de-

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scribed in the note. The Court sustained the objection and rejected the evidence. The evidence did not support the plea, and did not apply to the land which constituted the consideration of the note and was properly rejected.

[2.] The note sued on, was received in evidence on the trial without objection. The evidence showed that a man by the name of Summerlin was to be interested in the contract, and was to have signed the note. The Court charged the jury that the note was binding on Dickerson, although Summerlin never signed it. Dickerson put the note in circulation as his own note, and is bound by it; and it was notice to the holder, on the face of it, of no defence, except the expenses of a law suit.

[3.] The holder of a promissory note is presumed to be a *bona fide* holder for value, without notice, and the presumption is that he received it before due.

[4.] He is not bound to prove that he paid value for it unless it be proven that the note had been stolen or lost. This charge is excepted to as a whole, but we see nothing in it to disapprove.

[5.] When the counsel for defendant was about to address the jury and insist that the plaintiff had not proved that he had given value for the note, the Court stopped him, saying that no evidence had been introduced shifting the onus, and he charged the jury to the same effect. The Court ought to have arrested an argument not based on the evidence, and it was also his duty, in the total absence of evidence to a point attempted to be argued to the jury, so to charge.

Judgment affirmed.

**ROME RAILROAD COMPANY, plaintiff in error, vs. SULLIVAN,
CABOT & Co., defendants in error.**

- [1.] A declaration alleging that the defendants received 40 bales of cotton, to be delivered to R. & C., at Charleston, South Carolina, is not supported by proof that it was to be delivered to the Agent of the South Carolina Railroad, at Augusta.
- [2.] The marks on bales of cotton is no evidence of the contract between the parties; they are mere directions to the carrier as to the place of ultimate destination.
- [3.] The Rome Railroad Company has a right, under the powers granted in its charter, to contract to deliver produce at a point which can be reached only by passing it over connecting roads.
- [4.] It cannot, however, bind the companies owning the connecting roads, without their consent or acquiescence.
- [5.] If there be no special contract, a railroad company is not bound to carry freight beyond the terminus of its road; but if it be directed to a place beyond, it is bound to deliver it over to the proper custody, to ensure its due transportation.

Nonsuit and new trial, from Floyd county. Decided by Judge HAMMOND, August Term, 1857.

This was an action brought in the Court below, by Sullivan, Cabot & Co., to recover from the Rome Railroad Company, damages for loss alleged to have been sustained by the delay of said company in transferring 40 bales of cotton, which the plaintiffs had shipped by said company, to be delivered to the agent of the South Carolina Railroad at Augusta, and consigned to Robinson and Caldwell at Charleston. The plaintiffs alleged, that between the time the cotton was received by the company at Rome, and delivered by them in Charleston, the price of cotton went down.

The receipt given by the Railroad Company at Rome, stated that 40 bales of cotton had been shipped, (consigned to Robinson & Caldwell at Charleston,) and that the cotton was to be delivered to the agent of the South Carolina Railroad at Augusta.

The receipt was dated the 10th of January, and the cotton received by Messrs. Robinson & Caldwell at Charleston, on the 25th and 28th of February following.

The plaintiffs, after the introduction of some testimony to the above facts, closed, and the defendants moved for a nonsuit on the following grounds:

1st. Because the plaintiffs had entirely failed, by their testimony, to make out a case against the defendant, there being no testimony showing that defendant ever contracted to carry said cotton to, and deliver the same in Charleston, as alleged in plaintiffs' declaration.

2d. That the Rome Railroad Company being a corporation with limited powers, for the transportation of merchandise between Rome and Kingston, the officers of said corporation have no power to bind the company, by contract, for transportation beyond these limits.

3d. That the limitations in the charter settle the construction of the contract, and a general consignment or mark beyond the chartered limits of the road, creates no *prima facie* obligation to transport beyond those limits, but is, in legal effect and intendment, a contract to transport to the terminus, and then forward to the connecting road.

4th. That a receipt given, as testified to by Terhune, (the witness,) could not bind the defendants to transport the cotton beyond Kingston, the terminus of the Rome Railroad, and consequently the defendants could not be held liable for delay and damage beyond that point.

The Court overruled the motion, and the defendants excepted.

The Court charged the jury, 1st. That the agent of the Rome Railroad Company could contract to carry goods to Charleston, or any other point, and bind the company by such contract.

2d. That if the plaintiffs had shown such a contract, (which must be a special contract,) they were entitled to recover such damages as they had proven to have sustained, provided the plaintiffs have shown a want of diligence and proper attention on the part of the Railroad Company, in forwarding this cot-

ton ; but that the mere fact of a delay of the cotton, was not sufficient to justify a finding, as there must affirmatively appear to be a want of diligence.

Counsel for the defendants requested the Court in writing to charge,

1st. That the Rome Railroad Company being a corporation with limited powers, for the transportation of merchandise between Rome and Kingston, the officers of said corporation have no power to bind the company by contracts, for transportation beyond these limits.

2d. That the limitations in the charter settle the construction of the contract, and a general consignment or mark to points beyond the chartered limits of the road, creates no *prima facie* obligation to transport beyond these limits, but is, in legal effect and intendment, a contract to transport to the chartered terminus, and then forward to the connecting lines.

The Court refused to give the first request, and gave the second with the qualification, "that it was competent for the agents of the company to make contracts to carry merchandise beyond Kingston, and if the agents of the company did make such contracts, the company was bound by them.

To these charges and refusal to charge, and qualification of the charge asked, the counsel for defendant excepted.

The jury returned a verdict for the plaintiffs, and the counsel for the defendant filed their bill of exceptions, alleging,

1st. That the Court erred in refusing a nonsuit, on the grounds taken in the motion therefor.

2d. The Court erred in the several charges to the jury, as above set forth.

3d. The Court erred in refusing to charge the jury, as asked by the defendants' counsel, and in his qualification of the second charge asked.

4th. That the jury found contrary to the law.

5th. That the jury found contrary to the evidence.

6th. That there was no evidence to support or justify the several charges made by the Court.

PRINTUP, for plaintiff in error.

UNDERWOOD, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The declaration alleges, that the plaintiffs delivered at the platform of the defendant at Rome, Georgia, 40 bales of cotton, (describing them and setting forth their value,) "consigned to Robinson & Caldwell, Charleston, South Carolina, with instructions to ship and send forward immediately, and the said defendant, then and there, undertook and faithfully promised to send them forward, and to be safely and securely carried and conveyed by the said defendant from Rome Georgia, aforesaid, on their railroad and other railroads, to Charleston, South Carolina, aforesaid, and there, to-wit: at Charleston, South Carolina, aforesaid, safely and securely to be delivered for the said plaintiffs, to Robinson & Caldwell, for certain reasonable reward in that behalf." The contract was, as set out in the declaration, to receive the cotton at Rome, carry it on defendants' own railroad and other railroads to Charleston, and to deliver it at Charleston, to Robinson & Caldwell. The contract proven was, that the cotton was received by the defendant, at the transportation office of the Rome Railroad Company, at Rome, to be delivered to the agent of the South Carolina Railroad, at Augusta, Georgia. The cotton was marked "consignor" "Sullivan, Cabot & Co.," "Rome," "40 square bales of cotton;" "consignee, Robinson & Caldwell, Chas't, So. Ca." An extract from the shipping book of the defendants was offered and received in evidence, which contained a statement of the cotton, the marks, the names of the consignors and consignees, showing the amount of freight paid, when it was paid, and its apportionment.

amongst the different roads. This extract shows that the entire freight was paid at Augusta, and the amount divided amongst the several roads. No freight was paid to the South Carolina Railroad, and none was apportioned to it. After the submission of testimony by the plaintiffs, to show a breach of the contract as alleged, they closed their case; whereupon, the defendants moved for a nonsuit on the grounds set forth in the statement of the case. We think a nonsuit ought to have been awarded on the first ground taken in the motion. The receipt is the evidence of the contract, and according to that, the undertaking was to deliver the cotton to the agent of the South Carolina Railroad, at Augusta.

[2.] We think that the mark of the names of the consignees on the cotton, and their place of business or residence, was no part of the contract. Nor was it evidence of the contract. It was merely a direction to the railroad companies or their agents, as to its ultimate destination. It certainly cannot control the express undertaking contained in the receipt. The contract was to deliver to the agent of the South Carolina Railroad, at Augusta, Ga. If this was done in proper time, and in good condition, the contract was performed. If the defendant did not do this, it became responsible for all damages accruing from the failure. As there was no proof of the contract, as alleged, a nonsuit ought to have been awarded on that ground.

The second ground, (nor indeed, the third or fourth in the motion,) ought not to have been sustained by the Court, and the presiding Judge committed no error in overruling them. The charter of the company makes it a common carrier, as respects goods, wares, merchandise, produce, &c., and vests it "with full power and authority to do and perform all and every corporate acts as are permitted or allowed to other companies incorporated for similar purposes." *Acts of 1839, page 139.*

[3.] The powers granted are very comprehensive, and embrace whatever has been allowed or permitted to other com-

panies chartered for similar purposes. Its business is transportation, and transportation along a continuous line of road, parts of which belong to other companies. Its interest requires that it should enjoy all privileges granted to it under its broad powers, to ensure the greatest quantity of transportation, and it is certainly allowed to it to make all contracts for transportation over its own and connecting roads, which have been tolerated in other companies incorporated for similar purposes. Such contracts have been made and pronounced valid, under charters with, perhaps, a less extensive grant of power. This view of the case derives some support, perhaps, from the Act authorizing the State Road to be built.

The tenth section of that Act requires that the tracks of all branch roads contemplated by that Act, shall correspond in width with that of the State Road. The Rome Railroad is not mentioned in that Act, and I allude to it merely to show the legislative purpose or expectation, that there should be continuous transportation over the State Road and its branches.

[4.] We are not to be understood to say, that one incorporated company along a continuous line of road, may bind other companies by a contract, without their consent or acquiescence. We do not go beyond what we express, that the Rome Railroad has the power to bind itself by such a contract, and the receipt given, we think, placed it under a legal obligation to deliver the cotton to the agent of the South Carolina Railroad, at Augusta.

[5.] If there be no special contract, the company is not bound, as a matter of course, to carry freight beyond the terminus of its road, but if it be directed to a place beyond, it is bound to deliver it over to the proper custody, to ensure its due transportation.

Judgment reversed.

Davis, Kolb & Fanning vs. Allen.

DAVIS, KOLB & FANNING, plaintiffs in error, vs. **HENRY K. ALLEN**, defendant in error.

The delivery of a letter with money to the messenger who carries mail bags to the post office from the cars and back, without proof that he delivered the letter at the office, is no evidence that the money was sent by mail.

Assumpsit, from Coweta county. Tried before Judge **BULL**, September Term, 1857.

This was an action brought in the Court below by the firm of Davis, Kolb & Fanning for \$49 15. On the trial the defendant proved that the plaintiffs had instructed him by letter to remit to them the said account by mail. He also proved by John R. Alexander that while he (Alexander) was acting as post master at Newnan, the defendant came to him at the post office, with an uninclosed letter in his hand addressed to plaintiffs, and had \$49 15 which he wished to mail to them. That witness stated to the defendant that it was too late to mail the money in the post office on that day. Witness put the money in the letter and sealed it up and gave it back to the defendant, and the defendant took the letter down to the depot and gave it to a man named Rucker, who was the mail messenger to take mail bags to and from the post office, and saw the said Rucker go towards the cars with the mail bag in one hand and the letter in the other, but did not see him put it in the post office or the cars.

The jury found a verdict for the defendant, and the plaintiffs moved for a new trial on the following grounds:

1st. Because the verdict was contrary to evidence and without evidence.

2d. Because the Court erred in charging the jury that if they believed from the circumstances that the debt had been paid, then they would find for the defendant, there being no evidence before the jury authorizing this charge.

The Court overruled the motion for new trial, and to this decision of the Court the plaintiffs excepted.

The State of Georgia vs. Woodley.

LIGON ; and SIMMS, for plaintiffs in error.

BUCHANAN & W., *contra*.

By the Court.—McDONALD, J. delivering the opinion.

A person directed to send money by mail must prove a literal compliance with the order, by depositing the money in a letter in the post office, or by delivering it to the post master or his known agent in the post office. The debtor Allen was not discharged from the debt by delivering the letter to the messenger Rucker, who merely carried the mail bags to the post office from the cars and back. He made him his agent merely, to deposit the letter in the post office and should have proved that he delivered it according to instructions.

The judgment of the Court below must be reversed.

Judgment reversed.

THE STATE OF GEORGIA, plaintiff in error, vs. GEORGE W. WOODLEY and others, defendants in error.

See the case of *The State of Georgia vs. William H. Lockhart*, decided at Macon, January Term, 1858, and which covers every point made in this record.*

Scire facias to forfeit recognizance, from Henry county. Decision by Judge CABINESS, at October Term, 1857.

George W. Woodley being charged with the offence of simple larceny, (stealing a buggy and harness, the property of the estate of Raleigh Hightower, deceased,) entered into recognizance with sureties, conditioned to appear at the next

*NOTE :—The case referred to : *The State vs. Lockhart*, 24 Ga. Rep. p. 420.

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Superior Court of Henry county, to answer the charge &c. He failed to appear and an order of forfeiture of his recognizance taken, and *scire facias* issued against the accused, and sureties to show cause why the judgment of forfeiture should not be made absolute.

The sureties appeared and pleaded, 1st. *Nul tiel record* ; 2d. Insufficiency of the indictment ; 3d. Death of their principal, and 4th. *Non est factum*

Counsel for the State demurred to the second and fourth pleas. The Court overruled the demurrer, holding that the order of forfeiture was only a judgment *nisi*, and that defendants were not precluded or estopped thereby from making any defence, which at any time they were entitled to make.

The Court having ruled and decided that all the allegations of the *scire facias* must be proven and that the indictment must be produced, counsel for the State read the *scire facias*, and offered in evidence the judgment of forfeiture *nisi*, the recognizance, the indictment with the entry thereon of "true bill," with all the other papers of record in the case.

Defendants demurred to this evidence, and after argument the Court sustained the demurrer, holding :

1st. That there was a fatal variance between the crime charged in the indictment, and that set out in the recognizance and *scire facias*.

2d. That there was a variance between the order of forfeiture or judgment *nisi*, and the recognizance. That the crime of simple larceny was defined in the penal code to be the wrongfully and fraudulently taking and carrying away the personal goods of another, with intent to steal the same. The offence alleged in the recognizance was the wrongfully and fraudulently taking and carrying away a carriage commonly called a buggy, the property of the estate of Raleigh Hightower, deceased. The buggy was not alleged to be the property of any person and therefore the crime charged did not come within the definition of theft or simple larceny in the penal code.

Mickelberry & Mobley vs. Shannon, adm'r.

3d. The Court further held that the crime charged in the indictment was the stealing a buggy, the property of Hightower and Hightower, administrators of Raleigh Hightower, deceased, and was variant from the one recited in the recognizance and *scire facias*, and did not amount to the offence of simple larceny.

Whereupon the Court ordered the *scire facias* to be dismissed, and counsel for the State excepted.

JAS. R. LYON, and CLARK & LAMAR, for plaintiff in error.

ALFORD & MOORE; and J. J. FLOYD, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

All the points in this case, were fully argued and ruled adversely to the plaintiff in error in the case of the State of Georgia against William H. Lockhart, from the Chattahoochee Circuit, decided at Macon, at the last Jannary Term, of this Court, not yet reported.

Judgment affirmed.

MICKELBERRY & MOBLEY, plaintiffs in error, vs. JOHN SHANNON, administrator, defendant in error.

A. and B. give their note payable to C., for the hire of a negro for a particular year. The negro having been previously hired to another person, the note is returned to B., who, for a consideration, re-issues it to D.

Held, that the original note having become *functus* upon its re-delivery to one of the makers, on account of the failure of consideration, could not be re-issued by B., especially to one who had a knowledge of all the facts.

Mickelberry & Mobley vs. Shannon, adm'r.

Certiorari, from Monroe county. Decision by Judge CABINNESS, at August Term, 1857.

John Shannon, administrator of Robert Mays, deceased, was sued in a Justice's Court, by Mickelberry & Mobley, on five several promissory notes, four for \$30 each, and one for \$5 00.

It was agreed by the parties, that the trial and decision in one of the cases should control and determine all.

The following is a copy of the notes :

"\$30. By the 25th December next, we or either of us promise to pay William McCune, guardian of Nealy McCune, or bearer, the sum of thirty dollars, for the hire of a negro man Clem. This 4th of January, 1853.

[Signed]

ROBERT BLAKELY.

ROBERT MAYS, *Security.*"

Shannon pleaded in the Justice's Court, failure of consideration, and proved by William McCune, the payee of the notes, that he authorized James M. Clower to hire a negro boy, Clem, to Robert Blakely, for \$125, and required him to take small notes and good security; he never saw the notes, therefore don't know who the security was; knows of no other notes for the hire of a negro for the year 1853, by Mr. Blakely to him, only those alluded to; "Mr. Blakely did not get the negro, because, before Mr. Clower informed me he had hired the negro boy, I had hired him to another man in this county. He did inform me after I had hired him out in this county, (Butts) that he had hired him to Mr. Blakely."

Plaintiffs proved by Clower, that he traded the notes to them after they were due; that he held the notes before they were due; that he got them from Robert Mays, the last of February, 1853, and paid him the money for them.

The Justice, before whom the case was tried, permitted the jury to take out with them, *Story on Promissory Notes*, with their attention directed to those sections relied on and read by plaintiffs. The jury found for the plaintiffs, and defendant

applied for a *certiorari* to correct the errors of the proceedings and verdict.

Upon the trial in the Superior Court, counsel for Mickelberry & Mobley moved to dismiss the *certiorari*, on the ground that twenty days notice of the application for *certiorari* had not been given; that the notice was served only on the day the writ was issued. The Court refused the motion, and counsel excepted.

After argument upon the merits, the Judge sustained the *certiorari*, and ordered judgment to be entered of record, in favor of Shannon, the defendant, in the Justice's Court, and that plaintiffs pay the cost; holding, that no question of fact was involved which rendered it necessary to remand the case for a re-hearing in the Justice's Court.

To which decision counsel for Mickelberry & Mobley excepted.

J. M. VARNER, for plaintiffs in error.

PEEPLES & CABINESS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Could Mays, under the facts of this case, re-issue the note sued on?

Beck vs. Robley, cited in 1 *Henry Blackstone*, 89, note, (*Chitty Jr.* 399, 450 note,) was a case of this sort: Brown drew a bill upon Robley, which Robley accepted, payable to Hodgson or order. Robley did not pay it when it was presented, upon which, Brown took it up; Brown afterwards endorsed it to Beck, and Beck brought an action upon it against Robley. But the jury thought that when Brown took up the bill, its negotiability ceased, and found for the defendant. And on a *rule nisi* for a new trial, the Court thought the jury right. And Lord Mansfield said, "when a draft is given payable to A. or order, the purpose is, that it shall be

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payable to A. or order: and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable, Hodgson would be liable, for which there is no color."

In the note before us, the consideration is expressed to be for the hire of a negro, which was never delivered; and on that account the note was returned to Mays. And Clower swears, that he afterwards paid Mays for the note. This is entirely another and new contract.

Judgment affirmed.

DANIEL S. PRINTUP, Trustee, plaintiff in error, vs. WILLIAM T. TRAMMEL, defendant in error.

[1.] A Trustee is not liable out of his own estate, on a note given by him "as trustee," and so expressed when the consideration of the note enured exclusively to the *cestui que trust*.

[2.] Before the Act of 1856, trust property could be subjected to the payment of trust debts, through a Court of Equity only.

Complaint, from Floyd county. Tried before Judge HAMMOND, at August Term, 1857.

This was an action by William T. Trammel against Daniel S. Printup, as trustee, for Mrs. Abbey Farrar, on two promissory notes, each for \$150, which defendant, as trustee for Mrs. Abbey Farrar, promised to pay, &c. Signed "Daniel S. Printup, trustee for Mrs. Abbey Farrar."

It was proven on the trial, among other things, that the consideration of the notes sued on, was a town lot in Rome, which plaintiff sold to Samuel Farrar as the agent of Mrs.

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Farrar, that the trade and bargain for the lot was made with Mr. and Mrs. Farrar, and that defendant had nothing to do with the terms or consideration of the contract.

Upon the trial on appeal, defendant moved to dismiss the action:

1st. Because the notes sued on showed that defendant undertook and promised as the trustee of Mrs. Farrar, and not otherwise, and that an action *at law*, could not be brought on them against him *as trustee*.

2d. Because in Equity only could the rights of the parties be properly adjudicated.

The Court refused the motion to dismiss, and defendant excepted.

After the testimony on both sides had closed, the Court charged the jury, that although the defendant gave the notes as trustee, yet he was liable personally, and the plaintiff had the right to recover *at law*: that defendant was not bound to give notes as trustee, but if he did so, the presumption of law was, that he had the means in his hands to protect himself.

That as trustee, defendant had the right to appeal, but if the jury believed from the evidence that the appeal was for delay only, it was their duty to award damages not exceeding 25 per cent. as in their judgment they should think just.

To which charge defendant excepted.

The jury found for the plaintiff three hundred dollars with interest and cost, and twenty dollars damages.

Whereupon defendant tendered his bill of exceptions, and alleges as error:

1st. The refusal of the Court to dismiss the action.

2d. The charge of the Court.

3d. The verdict, as contrary to law and evidence.

D. S. PRINTUP, for plaintiff in error.

HARVEY, and UNDERWOOD, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The plaintiff in error promised to pay, "*as trustee*," expressed in the body of the promissory notes; to his name, subscribed to each note, he added, "trustee for Mrs. Abbey Farrar."

[1.] The consideration of the notes was property purchased for the *cestui que trust*. A note given by A. and B. "*as executors*," is recoverable from A. and B. individually. 2d. *Brod. & Bing.* 460. We think the case of a trustee different from that of an executor, who has no right to deal with the property of his testator. His duty begins and ends with the collection of the assets of the estate, and paying the debts and legacies. It is true, that the will may make him a trustee as well as executor. If it does, his character of executor is changed into that of trustee. But as executor, he has no authority to purchase property for the estate, or to deal in a manner, making it necessary to give his note. If he give his note as executor to a creditor, he is liable out of his own estate, for a very palpable reason. It is an admission of assets to pay. If he give his note payable at a future day, he makes the debt his own, for the same, with an additional reason, that it may be a personal benefit to him to postpone the day of payment, when it is generally to the interest of legatees and creditors to have prompt payment when the assets are in hand. It is not the same with trustees, who are, often, under the necessity of dealing in a manner, for the benefit of his *cestui que trust*, to create a debt payable in future. In such cases there are many reasons founded in good policy, justice and sound sense, why a trustee should not be held personally liable. Trustees are but poorly paid; when they make purchases, the persons who sell, know that

they are dealing on the credit of the trust estate, and ought to have just the security they rely on and no more. In this case, the plaintiff in the Court below sold property to the *cestui que trust*; the notes were given for the property, the trustee specifies in the face of each note that he promises *as* trustee, and the plaintiff received them with such understanding, and he ought not to be allowed to recover of the trustee individually. In the case of *Ashley vs. Ashley*, 7. *Barnwell & Creswell*, 446, some of the Court but for the power of precedents, would have recognized a rule more compatible with reason and justice, in the case of executors, and I know of no authorities which bind us down in a case like the present, to say that the trustee shall be liable from his private funds.

[2.] At the time this suit was commenced, a trust fund could be subjected to the payment of debts through a Court of Equity only. That Court has always claimed and held an exclusive jurisdiction in such cases. It can enquire into the whole matter, and determine whether the debt was necessary and just, and properly chargeable upon the trust fund; whether the trustee had acted in any manner faithlessly, so as to subject him to a liability for the whole, or a part of the debt; whether there had been fraud or imposition on the part of the creditor, so as to affect his right of recovery, in whole or in part.

Since the institution of this suit, the Legislature has passed an Act to authorize claims against trust estates to be recovered in a Court of law.

It is an Act respecting the remedy, and claims arising before its passage, may be collected under it.

The Court below erred in refusing the motion to dismiss the case, and also in charging the jury that the defendant was personally liable, and that a Court of law had jurisdiction of the case.

Judgment reversed.

· Bigby vs. Powell, adm'r.

JOHN BIGBY, plaintiff in error, vs. GEORGE POWELL, administrator, defendant in error.

- [1.] To entitle a complainant in equity to relief on the ground of fraud, there must be damage as well as fraud.
- [2.] It is no ground of equity that counsel misrepresented the contents of a bill of exceptions to the Judge for his certificate or signature, or to the counsel of the opposite party for his acknowledgment of service. In such cases, it is always at hand and ought to be read.
- [3.] If defendant in error relies, as a defence, upon a release of the errors assigned in the record, he must plead it.
- [4.] A complainant seeking relief, cannot rely on a mere *obiter* of the Court during the progress of an argument before it, as settling the law, nor of a declaration by a member of the Court of what would have been the decision of the Court under a different state of facts, which would have been presented had he not been entrapped by representations of opposite counsel, as entitling him to an equity, when there is none without it, and the declaration is not sustained by the law.
- [5.] If a party be entrapped, by misrepresentations, to join issue on assignment of error, he ought, as soon as he discovers it, show it to the Court and move to withdraw his joinder.
- [6.] The omission of a palpable duty ought never to be allowed as a ground of equity.

In Equity. From Coweta county. Decision by Judge
BULL at September Term, 1857.

This was a bill filed by John Bigby against George Powell, administrator of John B. Russell, deceased.

The bill, in substance, states, that in the year 1847, plaintiff brought his action of trover against said Russell, then in life, for three negroes. That at September term, 1850, a verdict on the appeal was rendered in favor of defendant; whereupon plaintiff moved for a new trial, and at March Term, 1853, the verdict was set aside and a new trial granted. In the meantime Russell departed this life, and defendant, George Powell, his administrator, was made a party. At the same Term, March, 1853, a trial was had and a verdict for plaintiff for two of the negroes (one having died) and \$799 87 for hire, and cost of suit: upon which judgment

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was signed and entered; and the same was discharged by the delivery of the negroes and the payment of the money, without any execution being sued out; and the suit was regarded as terminated.

The bill further states, that the counsel of Powell, and without his orders or instructions, within thirty days from the adjournment of the Court at which said verdict was rendered, and after the negroes were delivered up and most of the hire paid, made out a bill of exceptions in said case, and tendered the same to the presiding Judge, assuring him that the same contained "all the facts and carried up the whole record," and that plaintiff's counsel had examined it and was satisfied. That the Judge, relying upon this statement, certified to the correctness of the bill of exceptions, when in fact, plaintiff's attorneys had never examined said bill or agreed to the same.

- The bill further states, that counsel for defendant presented said bill of exceptions to plaintiff's attorney to acknowledge service, assuring him, upon his professional honor, that the record was full and complete, and all the facts stated, and pretending to be in a great hurry; relying upon this assurance, complainant's attorney acknowledged service without examining the papers; that said bill of exceptions did not contain all the facts, and was partial and incomplete, and only set out the proceedings in the case up to the granting of the new trial, and was wholly silent as to the last trial and all the subsequent proceedings. That at the Supreme Court, defendant's counsel again applied to complainant's counsel to join issue, stating that all was right, and that his associate counsel had joined issue, but that it was lost, and he only wanted it replaced; and also further stated that complainant's associate had admitted that the record was full and right. Misled and deceived by this statement and device complainant's counsel joined issue without examining the papers, and without suspecting any unfairness or improper advantage, until, in his argument before the Supreme Court,

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he was stopped upon the ground that the bill of exceptions and record showed no proceeding or action in the Court below subsequent to the order granting the new trial, and by this means a judgment was obtained in the Supreme Court, reversing the judgment and order of the Court below, granting the new trial.

The bill further alleges, that defendant, Powell, availing himself of the advantage thus fraudulently obtained, is seeking to recover of plaintiff the said two negroes and their hire, and has instituted, for that purpose, his actions—one of trover, and the other of assumpsit. That complainant cannot successfully defend said actions at law by reason of the facts aforesaid, and prays that said actions be enjoined, &c.

To this bill defendant demurred. First, for want of equity. Second, that the remedy at law was ample and sufficient.

The Court sustained the demurrer and dismissed the bill. Whereupon counsel for complainant excepted and assigns as error said judgment.

ROBERT W. SIMMS, for plaintiff in error.

WARNER; and MCKINLEY, *contra*.

By the Court.—McDONALD J. delivering the opinion.

This case was before this Court at February Term, 1854. It came up then on an exception to the decision of the Court below, allowing the defendant in that Court to enter up a judgment, *nunc pro tunc*, on the verdict which had been rendered in his favor, this Court having reversed the judgment of the Court below, which had granted a new trial in said cause.

This Court affirmed this last judgment, the effect of which was to annul the proceedings in the Circuit Court subsequent, to and consequent on the judgment of that Court granting a new trial. The defendant in the action having surrendered the negroes sued for, and having also paid the

hire recovered on the trial of the cause, before the reversal of the judgment ordering a new trial, now brings his actions to recover back the negroes and the money delivered and paid over on the annulled judgment. This bill is filed on the ground presented in the statement prefixed to this opinion, and prays a perpetual injunction of these actions. The bill was demurred to, the demurrer was sustained and the judgment of the Court below on the demurrer is excepted to and assigned as error.

The ground upon which the complainant presents his title to relief is, that he was misled and deceived by the statements and denials of the counsel of the opposite party, as set forth in the bill, and was thereby entrapped into a joinder of issue on the assignment of error in the cause when first brought to this Court, which, by the rules of practice of this Court at that time, amounted to a waiver of objections to a sufficiency of the record as sent up.

[1.] When a suitor presents himself to a Court of Chancery for relief from a contract on the ground of fraud or imposition, he must show a case in which he not only relied on the statements of the opposite party, but he must show that there was a necessity for it from causes deemed adequate by the Court. In a case like this, the same rule applies. Again, to be entitled to the relief sought, the party must show, not only that he was misled and deceived, but that he was endangered thereby. If no damage resulted from the fraud, he is entitled to no relief. In other words, to apply the principle to this case; if in the case in which a reversal of the judgment of the Circuit Court on the motion for a new trial was sought, the entire record of the cause, including the last trial in which the verdict was for the plaintiff, had been sent up by the Clerk, and the judgment of reversal must, nevertheless, have been rendered, there could have been no damage resulting to the complainant from the alleged fraud of the counsel of plaintiff in error, there can be no ground for the interpretation of the Court of Equity.

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Testing the complainant's title to relief by these rules, it cannot be sustained. When the bill of exceptions was offered to the plaintiff's counsel for his acknowledgment of service, there was no necessity for his relying on the statements of the opposite counsel as to its contents. He ought to have examined it. The enquiry must have been made of counsel for plaintiff in error in relation to the bill of exceptions on which an acknowledgment of service was requested, and not to the transcript of the record. The transcript of the record is never made out until the bill of exceptions is filed, and that is never filed until notice or service of a copy on the opposite party or his counsel. The bill of exceptions does not contain the record, nor does it carry it up; it only contains, or rather specifies, the errors complained of in the decision or judgment of the Court; and it ought to contain, further, a brief of the oral and a copy of the written evidence adduced on the trial in the Court below. It is the duty of the party or his attorney complaining of the decision or judgment of the Court, to make out the bill of exceptions; and it is the duty of the Clerk to make out, certify and send up a complete transcript of the entire record of the cause below. When the counsel spoke of the record, therefore, on presentation of the bill of exceptions for the signature and certificate of the presiding Judge, or for the acknowledgment of service by the opposite party or his counsel, he must have spoken in reference to the bill of exceptions, and spoken of it, as it was *his* duty to make it out. If it specified with clearness the errors complained of in the judgment, and contained a brief of the oral and a copy of the written evidence adduced in the Court below, it was complete; and the bill in this case does not complain that it does not. The allegation of the bill is, that the bill of exceptions did not contain all the facts, and was partial and incomplete, and only set out the proceedings in the case up to the new trial; and was wholly silent as to the last trial and all the subsequent proceedings. The object of the bill of exceptions was

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to have the judgment of the Court below granting a new trial, reviewed, and corrected if erroneous. There was no complaint of error in the subsequent trial, and so far as the bill of exceptions was concerned, which it was the duty of the counsel to prepare, it was sufficient and full as to its purposes and objects, and it ought to have been silent as to the last trial and all the subsequent proceedings.

[2.] But it is said that the statement of the counsel prevented the party from looking into the transcript of the record, and suggesting a diminution thereof, which he would have done, on the ground that the record of the proceedings and trial, subsequent to the judgment of the Court ordering a new trial, was not sent up. It is not entirely certain, although there was an intimation from some of the members of the Court, on the first impression, to the contrary, that it would not have been held, upon solemn investigation of the question, that the record, as sent up, was not all that was demanded by the law, being a complete transcript of the entire record of the cause below. It will be remembered that the entire record of the cause up to and including the final judgment of the Court granting the new trial, was sent up, and that it was that judgment on which the error was assigned. This seems to me to have been sufficient as a complete transcript of the entire record of *the cause* below, which was brought up by the plaintiff in error.

[3.] But if it was not, could the defendant in error have availed himself of a waiver or release of errors, otherwise than by plea? I apprehend not. The bill does not show that there was a plea, but on the contrary, that the counsel was insisting on the defence in this Court without a plea, by way of demurrer or argument. He could not demur, for it was the bill of exceptions which alleged and specified the errors, and it was neither necessary nor proper that it should have set forth the proceedings subsequent to the final judgment on which the error was assigned. The counsel could not have demurred to the transcript of the record; nor could

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he have relied on matter therein contained as a waiver or release of errors without a plea. A release of errors necessarily admits the errors complained of, but sets up matter in avoidance. Such plea may, in its turn, be the subject of reply or demurrer.

[4] The bill before us does not allege that there was a waiver or release of errors by the plaintiff in error, in the judgment of the Court awarding a new trial. It gives a history of the proceedings in the Circuit Court and in the Supreme Court, and merely alleges, on that branch of the case, that the counsel for complainant was proceeding, in the Supreme Court, to rely on the progress of the case in the Court below, after the granting of the new trial, and the subsequent trial, as a waiver and release of errors in that judgment, when he was stopped on the ground that the bill of exceptions and record showed no such proceedings; and that this Court declared that if these proceedings had been sent up, it would have held that all errors in the judgment complained of were released thereby, and would have pronounced a judgment of affirmance. A declaration of this Court under such circumstances cannot settle the law, nor can it entitle a party to an equity when there is none without it—the declaration cannot be sustained by the law. We think, however, upon a deliberate consideration of this case, that there was no release of errors in that case by the defendant to this bill. The cause was not called up for trial at his instance, but in its order. He may not have had a good cause for continuance; and perhaps was not present, according to the bill, to make a showing. After the judgment was rendered in the cause, to pay it off, presented no impediment to his right to have the error in the judgment of the Court granting a new trial reviewed and reversed.

[5.] If the party was entrapped into a joinder of issue on the assignment of error by the misrepresentations of his adversary, he ought to have shown it to the Court and moved

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to be allowed to withdraw it and suggest a diminution of the record.

[6.] It would be extremely dangerous to make it the foundation of a proceeding in Chancery, to upset the judgments of this Court, or to delay their execution, that counsel have misrepresented to the Court or the opposite counsel the contents of a bill of exceptions. It is the duty of both to examine them. The omission of a palpable duty ought never to be allowed as a ground of equity.

Judgment affirmed.

JOHN BIRD, plaintiff in error, vs. JOHN T. MEADOWS, defendant in error.

Assumpsit, from DeKalb county. Decided by Judge BULL, October Term, 1857.

This was an action of assumpsit upon a promissory note for \$500, given in 1853 by the plaintiff in error, who was the defendant in the Court below, to G. J. Wright, and by the said Wright transferred to the defendant in error.

Defendant pleaded that the payee of the note was by its terms, to present the claims of Elijah Bird, then under sentence of death for murder, and to use his influence with the Legislature and the members thereof in an illegal way, to-wit: Said payee was to resort to no other means to obtain the pardon of said Bird than by using the authenticated copy of the testimony given by the witnesses for and against said Elijah; thereby making the Legislature of the State act as an appellate tribunal.

Plaintiff's counsel demurred to the plea.

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The Court sustained the demurrer, and counsel for the defendant excepted.

The jury found a verdict for the plaintiff, and the defendant excepted.

HAMMOND and SON appeared for the plaintiff in error.

HILL, *contra*.

By the Court.—BENNING J. delivering the opinion.

This case is like the preceding one,* except that there does not arise in it, the second question, which arose in that case. Consequently, there will be the same judgment in it—an affirmation.

Judgment affirmed.

*Bird vs. Breedlove, 24 Ga. Rep. 623.

THOMAS McLENDON and wife and others, plaintiffs in error,
vs. N. H. WOODWARD and others, defendants in error.

Heirs at law may, upon a special case made, as for instance upon a charge of collusion between the parties, institute suit over the head of the administrator, making him a party defendant in the case. It requires, however, a clear case, to justify this interference with the due course of administration, by the trustee appointed by the testator, or by the Ordinary.

In Equity, from Butts county. Decision on demurrer,
by Judge CABINESS, at July Adjourned Term, 1857.

This bill was filed by Thomas McLendon and wife, and others, heirs and distributees of Aaron Woodward, deceased, late of the county of Butts, against William J. Woodward, administrator of said deceased, and Newdigate H. Woodward,

Robert Woodward and Aaron Woodward, sons and heirs at law of intestate.

The bill states that the intestate departed this life possessed of a large estate both real and personal, consisting of lands, negroes, stock, corn, provisions, household and kitchen furniture, cash, bonds, notes, &c., amounting to about forty thousand dollars. That for about eight years prior to his death, said Aaron became, from extreme old age, weak and imbecile in mind and body, and totally unable to manage and control his business and estate, and that he was a fit subject and easy victim of imposition and fraud, and liable to be overreached and swindled by his children or others. That Newdigate H. Woodward influenced, by the most selfish and fraudulent motives, for many years before intestate's death, took possession of his entire estate, sold the crops, hired many of the negroes, and used and applied and converted the proceeds to his own use and benefit, and so continued to exercise said control, and gathered the growing crop, after intestate's death, and converted the same to his own use.

The bill charges that the administrator has failed to institute suit, or take any steps to recover the property and funds thus appropriated by Newdigate, and which legally belongs to the estate of his intestate, and which complainants pray he may be compelled to account for.

The bill further charges that the defendants, well knowing their father's weak and imbecile state of mind and body, and his incapacity to deal and contract in reference to his estate, combined and confederated together, to get into their possession, before his death, the greater and most valuable part of his estate; and thus deprive complainants of their equal share thereof upon the decease of their father, and did fraudulently cause and induce the intestate, a short time previous to his death, (10th January, 1851,) without consideration, to execute to them respectively, deeds of gift of a large portion of his negroes, which they took into their possession, and have

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continued in the possession of the same, and now assert and claim an absolute right and title thereto as their individual property. The deed of gift to William J. Woodward is dated ———, 1851, and he received and took possession of only two of the negroes mentioned and contained in his deed.

The bill further charges, that defendants living in the immediate vicinity of their father, stated to divers persons, in justification and explanation of their control and management of his estate, that their father was not capable of taking care of and managing the same; and being thus in possession of his estate, defendants took, carried off and used and appropriated such negroes and other property belonging to him as they desired, and took and appropriated a considerable amount thereof to their own uses and purposes, and are now in the possession and enjoyment of the same.

The bill further states, that William J. Woodward, administrator as aforesaid, has instituted actions of trover against said Newdigate, Robert and Aaron for the recovery of the negroes mentioned in said pretended and fraudulent deeds of gift, but said actions are believed to be pretensive, and the administrator holding under a similar deed, is not a fit and proper person to be entrusted with the prosecution of these suits; and that he has failed and refused to file a bill in equity to set aside said deeds, and to bring said defendants to an account for other large and valuable portions of the property and estate of intestate in their hands.

The bill prays that said deeds of gift be declared void, and cancelled, and that the negroes therein pretended to be conveyed, and now in the possession of defendants be decreed to belong to the estate of said Aaron Woodward, deceased, and subject to distribution amongst all his heirs; that said defendants account for all the money and property which they have received and taken from the intestate; and that the actions of trover be enjoined, and all controversies, claims and

matters in litigation, relating to the estate of intestate be adjudicated and settled in this Honorable Court.

To this bill defendants, Newdigate H., Robert and Aaron Woodward, demurred,

1st. Because no such definite and distinct act of combination and collusion between the administrator and these defendants is charged in complainants' bill, as entitles them to maintain it upon that ground.

2d. Because defendant, Aaron Woodward, cannot be compelled to answer out of the county of his residence, (Spalding.)

3d. Because complainants cannot bring defendants into a Court of Equity to contest the validity of the deeds of gift while suit is pending at law by the administrator, for the same thing.

4th. Because the administrator has full and complete remedy at law against the defendants.

There was an amendment to the bill, but of what nature does not appear from the bill of exceptions.

The Court, after argument, sustained the demurrer, and dismissed the bill as to the defendants demurring. To which decision counsel for complainants excepted.

DAVID J. BAILEY, and JOHN J. FLOYD, for plaintiffs in error.

DOYAL & NOLAN, and GIBSON, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

I rather regret not having followed the inclination of my mind, at the time, and dissented from the judgment of affirmance in this case, leaving the opinion of the Court to be written out by one of my brethren. But as the bill was retained in Court, by awarding to the complainants the right to amend, I acquiesced.

As a whole, it occurred to me, at the time, and does still, that there is equity in this bill. Whether it be charged with

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sufficient definiteness and fullness, may be questioned. This is, in point of fact, a bill for account and distribution, filed by a portion of the heirs, against the rest, including the administrator, who is a son of the deceased, with the defendants, on account of his alleged complicity with them, in the conversion of the estate. It is set forth, that by reason of the imbecility of their common father, on account of his age, for some years before his death, one of the sons, Newdigate H., managed and appropriated his entire property to his own use—hiring the negroes, selling the crops, &c., &c. That all the sons, confederating together, procured deeds of gift to be executed to each, for certain negroes, which they took into their possession, and still hold. That the administrator, it is true, has instituted suits at law, to recover these slaves, but it is insinuated, rather than charged, that being himself in *pari delicto*, he will not prosecute these actions, vigorously and in good faith. And the bill states, that notwithstanding application has been made to him, to file a bill, for the purpose of having these sham and fraudulent titles cancelled, that he has failed and refused to do so.

Now we all agree, that an administration in the due course of execution—and especially where it is admitted, as in this case, that as to the assets, of which the intestate died seized and possessed, they have been faithfully managed—I say such an administration, should not be superseded or contralled for slight causes. Otherwise, the Courts will be crowded with applications for that purpose, upon the most frivolous grounds. Still, if a special case be made, and perhaps the strongest that can be made, is collusion between the administrator and the parties sought to be made chargeable, a Court of Equity will undoubtedly interfere. Does this bill make such a case? Under the judgment of the Court, the combination or common intent between the sons to defraud the other children and grand-children of old man Woodward, by fraudulently confederating to procure the deeds of gifts, to each, respectively, for certain of his slaves, should be more

distinctly alleged. The acts or contrivances by which the donor was circumvented, might also be set forth with more particularity. The value of the slaves at the time they were given; for perhaps this may involve the question of advancements in the distribution of the estate; and perhaps the bill might be amended with that alternative aspect, should the gift of the negroes be valid. The community of purpose between the administrator and the defendants in trover should be directly charged, and not left to be inferred from what is stated. Is there any other fact, except his bare refusal to file a bill, which goes to convict the administrator of a want of good faith to the complainants in the prosecution of these actions? If so, let it be stated. It does not appear from the bill, whether the residue of the estate has been distributed, and the defendants received a full share, irrespective of these slaves. If it has not been divided, why may not the bill be framed with a double aspect? If the rest of the estate has been distributed, and the defendants have received a full share, without accounting for these negroes in controversy, are the complainants remediless, unless they can subject these slaves to distribution? The case is suggestive of these and many other views which might be taken of the rights and remedies of those parties. But I forbear.

Judgment affirmed, with leave to amend.

JAMES S. WALKER, et al., plaintiffs in error vs. **NATHANIEL F. WALKER, Ex'or &c.,** defendant in error.

[1.] The minutes of arbitrators in a cause referred to them, cannot be made a part of the record of the cause.

[2.] A bill of exceptions (and bond and security given and costs paid) to the

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judgment of the Court, ordering an award of arbitrators *to be entered on the minutes of the Court*, does not suspend proceedings in the same, on a motion to make the award the judgment of the Court, the motions being distinct and independent of each other.

Award, from Upson county. Decided by Judge CABINESS, May Term, 1857.

A suit in equity was commenced in the Court below, and by consent of the parties, the matters in dispute were referred to arbitration, and two arbitrators, Washington Poe and Thomas P. Stubbs, appointed. These arbitrators made their award, to which exceptions were filed by the defendant in the suit.

Upon motion on behalf of the plaintiff, the defendant objecting, the award was entered on the minutes of the Court. To which decision defendant excepted, tendered his bill of exceptions, which was signed and certified, and cost paid, and gave bond and security as provided by law.

Afterwards, complainants moved to make the award the judgment of the Court, and to enter the minutes of the arbitrators upon the minutes of the Court, and to make them a part of the record of the case.

The Court refused this motion and counsel for complainants excepted.

STUBBS & HILL ; GOODE, SMITH and CHAPPELL, for plaintiffs in error.

GIBSON, COBB, GREEN and PEEPLES, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

This cause had been referred to arbitration by agreement of the parties, in writing. When the award was returned into Court, it was, on motion of complainant's counsel, entered on the minutes of the Court, the defendant's counsel

opposing it. Defendant's counsel excepted to the decision of the Court. They made out and tendered a bill of exceptions, which was signed and certified by the presiding Judge. The defendants paid the cost and gave bond and security. Afterwards, complainant's counsel moved the Court to enter the award of the arbitrators on the minutes, and to make it the judgment of the Court, and to cause the minutes of the arbitrators to be made a part of the record of the cause.

[1.] Two distinct motions were entered on the motion docket; one to make the minutes of the arbitrators a part of the record in the cause; and the other to make the award of the arbitrators the judgment of the Court. The Court refused the motion to make the minutes of the arbitrators a part of the record of said cause. It was debated before us whether this proceeding was had under the Act of 1856, or that of 1799.

We affirm that part of the judgment of the Court, under whatever Act it may have been had. If under the Act of 1799, the Court had no authority except to make the award the judgment of the Court, if not subject to legal objection. Under the Act of 1856, it had no authority beyond allowing it to be entered on the minutes of the Court. If it was subject to either of the objections allowable against it by that Act, it was a matter to be heard afterwards.

When the other motion was called for a hearing, viz: to make the award the judgment of the Court, the defendant's counsel tendered written exceptions to the award, supported by affidavit. The complainants traversed the said exceptions and made up an issue of fact thereon. The defendant's counsel protested against further proceeding with the said motion on the ground that a bill of exceptions had been made out, tendered to the presiding Judge, signed and certified by him on the judgment of the Court, ordering the award to be entered on the minutes of the Court, and that bond and security had been given, and the costs paid. The Court below held that this proceeding suspended the cause,

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and refused to proceed with said motion or the exceptions and issue made thereon.

We think that the presiding Judge in the Court below erred in this decision. The award had, by the previous order, been entered on the minutes of the Court, but it had not been made the judgment of the Court. The reference was certainly under the Act of 1799. It was made by agreement of parties in writing, and it was an agreement to refer a cause pending in Court.

The only proper motion was to make the award the judgment of the Court. The order of the Court to which the bill of exceptions applied was simply to put the award on the minutes. That order did not stand in the way of the application to make it the judgment of the Court, for it was not a preliminary step to it in any way, and was entirely independent of it.

The judgment of the Court below must be reversed on this last ground, which leaves the cause to be heard on the motion to make the award the judgment of the Court, the exceptions thereto, and the traverse or issue of facts made up on the exceptions.

Judgment reversed.

FRANCES P. CARROLL, by her trustee, plaintiff in error, vs.
DOUGLASS CARROLL, defendant in error.

Though a limitation over in a will is void as against the statute prohibiting entails, yet a provision that the property shall be in a trustee for the sole use and benefit of the daughter and her bodily heirs, and prohibiting its sale for any other cause and purposes, is good and effectual as to the separate estate created thereby for the daughter and the husband cannot dispose of it.

In Equity, from Henry county. Decision on demurrer by Judge CABINNESS, at October Term, 1857.

This was a bill filed by Francis P. Carroll, (by her trustee Isaac J. Hartsfield) against Douglass Carroll, her husband, to restrain him from selling and disposing of certain slaves, or removing them from the State, and to compel him to account for one which he had sold, &c.

The bill states that said slaves were bequeathed to said Frances P. by the will of her father, for her sole and separate use, and that defendant since his marriage with complainant has had possession of said slaves and asserts an absolute and unconditional title in and to the same.

The following is the clause of the will of Godfrey Hartsfield, deceased, the father of complainant, and under which she sets up an interest in and to said slaves, notwithstanding her coverture.

"Item 5. I will to my son Isaac, J, as trustee for each of my daughters, to-wit: Caroline E. Everett, Sarah E. Maddox, and *Frances Phelina*, and her bodily heirs, each one, tenth share of my negroes and proceeds of sale of my real and personal property as mentioned in item the third, which several shares as willed to said Isaac as trustee aforesaid, I bequeath for the sole benefit and use of my said daughters and their bodily heirs as before specified, disallowing the sale or transfer thereof, for any other cause or purpose than that herein mentioned."

To this bill, the defendant demurred, upon the ground that by the clause in said will cited, the property bequeathed vested absolutely in said Frances P., and upon her marriage with defendant he became absolute owner thereof.

The Court, after argument sustained the demurrer and dismissed complainant's bill, to which decision counsel for complainant except.

DOYAL & NOLAN, for plaintiff in error.

CLARK & LAMAR, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The presiding Judge in the Court below sustained the demurrer, and dismissed the bill on the ground "that the clause of the will, on which the bill is filed conveys an estate tail." We do not disagree with the Court below in regard to the kind of estate created, or attempted to be created by this will. The testator intended to give to his daughter and her bodily heirs, the negroes which she derived from his estate; and to settle her interest on her, separate and apart from her husband, He intended that she should take a life estate only. The limitation over being void, however, her life estate in the negroes was enlarged into an absolute estate. But the enlargement of her estate, did not destroy her right to maintain the trust for her sole use and benefit, and to enforce this prohibition in the will, that the property should not be sold for any other cause or purpose. The husband who has sold one of the negroes should be held to account for his value and to find sureties against the sale or appropriation of the proceeds of the hire or labor of the others, otherwise than is provided for in said will, and the bill ought to have been retained for that purpose.

Judgment reversed.

HERBERT B. ELDER, plaintiff in error, vs. ZACHARIAH O. WHITEHEAD et al, defendants in error.

An Attorney at law is not authorized to make the affidavit required by the act of 1842, to entitle a party to appeal without the payment of costs or giving security.

Affidavit on Appeal, from Pike county, decided by Judge CABINESS, at July Term, 1857.

An affidavit of illegality was filed by Herbert B. Elder the defendant in *ca. sa.*, issued from a Justice Court in favor of Zachariah O. Whitehead plaintiff in *ca. sa.*, and Joseph B. Askew assignee. The Court dismissed the illegality and judgment was at the same term of the Court rendered upon the *ca. sa.* bond in favor of the plaintiff.

To this judgment Thomas D. King the defendant's attorney appealed to the Superior Court, and made an affidavit to the effect that he believed that Herbert B. Elder had a good cause of appeal and that owing to poverty as deponent believed the said Elder was unable to pay the costs and give security as required by law upon an appeal.

A motion was made by the plaintiff's attorney to dismiss this appeal:

1st. Because Joseph B. Askew is stated in said appeal, to be plaintiff, whereas Zachariah O. Whitehead was the real plaintiff, and the said Joseph B. Askew only transferee.

2d. Because said appeal was entered from a collateral issue without an order from said Inferior Court showing their dissatisfaction with said judgment.

3d. Because said judgment was entered by the attorney of the appellant upon his, the attorney's oath of defendant's inability, instead of the affidavit of the party himself to his inability, to pay costs and give security as required by law.

The Court upon argument ordered the appeal to be dismissed on the ground that the attorney at law of the defendant had no power under the statute to make the affidavit, and to this decision the counsel for the defendant excepted.

GIBSON & FLETCHER, for plaintiff in error.

ALFORD, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The only question in this case is whether the attorney at law of a party can make the necessary affidavit to entitle him

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to appeal under the act of 1842, *Cobb* 501, without paying costs or giving security. There is nothing in the statute authorizing it, and it must receive a strict construction. The words are quite liberal enough, without extending them to cases not provided for in the act. The Court below dismissed the appeal entered on such an affidavit, and we affirm his judgment.

Judgment affirmed.

ISHAM C. KING, plaintiff in error, vs. ALVIN ARMSTRONG, defendant in error.

An award is subject to be set aside, for a mistake in it, even though, the mistake may not be apparent on the face of it. BENNING, J.

Award, from Whitfield county. Decided by JUDGE TRIPPE, October Term, 1857.

This was a motion on the part of I. C. King to set aside an award which had been rendered by the arbitrators appointed to settle the matters in difference between the parties in a suit in Equity of Alvin Armstrong vs. Isham C. King and Frederick Cox.

In support of this motion the movant read to the Court the following affidavits:

The affidavit of Charles W. Bond, who swore that he was one of the arbitrators who made the award, and that Armstrong presented a large account for monies alleged to have been paid out by him on account of the mill, amounting to about \$1850; that King knew nothing about the amount being presented so far as deponent was advised; that the arbi-

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trators awarded all or nearly all the amount, and that the deponent was satisfied some of the items were largely overcharged and some twice charged, and that the said King must have been injured by said overcharges and double charges at least \$200; that the arbitrators knew the property, but not the amounts paid out, and were governed by the said account until after said award was made, and that at the time they allowed said amounts within awarded, they supposed Armstrong had paid the same, and that had they been informed of the overcharges and double charges, at the time of making said award, they would not have allowed so large an amount to Armstrong. That they expected for King to use the mill-dam and water, as it was at the time, and at its then height, for otherwise the improvements would be of little value, and that the water of course was not to be interfered with.

The affidavit of O. Clarke who swore that he was one of the arbitrators who made award and Charles W. Bond the other arbitrator. That in the absence of King and without his knowledge Armstrong presented an account for money paid, work done &c. That he knew some of the items were overcharged, and that Armstrong had charged for expenses which were incurred in carrying on the mill, and not for making any additions to the the mill, at least \$100. That the arbitrators knew the property, but not the amounts Armstrong had paid out, and that in arriving at the amount, they were governed by the statement of said Armstrong; that at the time the arbitrators allowed said amount they supposed that Armstrong had paid out the amounts charged, and that they had no other evidence of the same than the statements of Armstrong, and that had they known of the overcharges at the time of making the award, they would not have allowed so large an amount to the said Armstrong. That at the time they made the award, they expected King to use the mill-dam and water, as it was at the time of making said award, with the water at its height, and all the other property freely and without any hindrance in any way, for if the dam

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had been lowered, deponent thought the property would be almost valueless. Deponent was a millwright, and that was his opinion.

The movant introduced the account of Armstrong.

The affidavit of A. F. Anderson, who swore that he did a job of hewing and getting mill timber for Armstrong, and that Armstrong paid him \$34 25 instead of sixty.

Another affidavit of A. F. Anderson, who swore that he did work on the mill and received from Armstrong 75 cents instead of \$10.

The award having been returned to the Court below, King entered an appeal, which at the succeeding Term of the Court, was dismissed on the ground that an appeal did not lie from said award, and at the same Term a *rule nisi* was obtained to set aside the said award.

After hearing the said motion, the Court refused to set aside the award, and counsel for King excepted.

WALKER, for plaintiff in error.

SMITH; and JOHNSON & JACKSON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The arbitrators, through mistake or ignorance, of law or fact, failed to state in the award, that King "was to use the mill-dam and water, as it was at the time" of the making of the award. The matter thus omitted, was of the first importance, to King.

Ought the award to stand in the face of such an omission, thus made by mistake or ignorance of law or fact? I think not.

I think, that if there is a mistake of law or fact in an award, the award is subject to be set aside, either at law or in equity. This opinion has the support, as it appears to me, of the cases that had been decided in England, at the time when the

law of England was adopted by Georgia. *Comeforth vs. Geer*, 2 *Vern.* 705; *Anon.* 3 *Atk.* 644; *Ridout vs. Pain*, 3 *Atk.* 486; *Richardson vs. Nourse*, 3 *B. and Ald.* 237; 3 *Burr*, 1258-'9. 1 *Ves. Jr.* 369; *Anderson vs. Darcy*, 18. *Ves.* 447.

There are decisions of a modern date in England, to the effect, that if an award is good on its face, it is not to be impeached on the ground of mere mistake. See the cases stated in *Russell on Arbitrators* 300. One of the very last cases, however, is directly to the contrary of these. It was made in *In re, Hall & Hinds, 2 Mann. and Gr.* 846.

I prefer to follow the earlier cases.

For this omission then, the award ought, in my opinion to be set aside; unless Armstrong will agree that the matter omitted, shall make a part of the award.

There are mistakes against King in the account, to the amount of about \$100; but there is also a mistake against Armstrong, to the amount of \$100. These opposite mistakes correct each other. So there is nothing in these mistakes to affect the award.

Judgment reversed, conditionally.

LUMPKIN J. concurring.

I concur in the judgment of the Court in this case.

It is clear from the bill and answer that the question, as to the backing of the water, caused by the mill pond, was included in the submission made to the arbitrators. It was *one*, of the "matters in difference" between the parties; and of course embraced in the reference.

From the answer of King which is not contradicted, it appears that he assisted Armstrong, in extinguishing the title to this lot; the arbitrators swear that this matter was embraced in the award, and so intended to be by them, and that unless the privilege of keeping up the pond, at the height

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which it then was, be awarded to King that the improvements made by Armstrong, on the premises and property, will be comparatively valueless. The arbitrators have allowed him full value for these improvements. In affirming the judgment of the Court then, making the award of the arbitrators the judgment of the Court, it is indispensable as an act of justice to King, and for the purpose of quieting further litigation, to accompany our judgment with the declaration, that it is understood upon the payment of the award, the right is guaranteed to King, of keeping up the pond at the height at which it stood when the award was made, without molestation of Armstrong, or those who hereafter acquire title under him.

It is conceded that should Armstrong attempt to interfere hereafter, that a Court of Equity would interpose by injunction and restrain him upon the case made in the record : why this doubt, delay and expense? Equity! Equity! Equity! Drive a citizen to resort to equity to do that, which a Court of law can just as effectually do now! Such absurdity cannot long withstand the battle axe of reform and the reign of reason and common sense, ushered in with the present century, but which until within the last twenty-five years, made but little advance in overturning the superstitious devotion to precedent and antiquity, which have so long retarded the progress of legal science.

McDONALD. J, dissented.

JAMES L. JOHNSON, plaintiff in error, vs. **MARTHA C. MARTIN**,
and others, defendants in error.

[1.] The notice of a party, that he intends to apply for a writ of *certiorari*, to carry up to the Superior Court a decision of the Inferior Court, need not be accompa-

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nied, either by a copy of the bill of exceptions tendered to and overruled by the Inferior Court, nor of the petition for *certiorari*.

- [2.] On an issue of fraud, tendered by the creditors, to an application by a debtor, to take the benefit of the Act passed for the relief of honest debtors, counsel for the creditors are entitled to open and conclude the argument.
- [3.] The schedule filed by an insolvent debtor, should contain a list of the property which he owned at the time of filing the same, and not the property which he had at the date of his arrest.
- [4.] An insolvent debtor, notwithstanding his arrest and imprisonment, may *bona fide* sell or mortgage his property for cash, or to pay or secure a pre-existing debt.
- [5.] All fraudulent conveyances or transfers of property, made by an insolvent debtor, to hinder or delay creditors, or in trust for the benefit of himself or his family, before or at the time of his arrest, or subsequently, will prevent him from taking the benefit of the Act.
- [6.] If a debtor, at the time of his arrest or after, or so short a time before as to create a just suspicion respecting the matter, is seen with money or other effects, it is competent for the creditors to prove the fact; and it will be incumbent upon the debtor to account for the same, in order to relieve himself from the inference of fraud, which the transaction suggests.

Certiorari, from Spalding county. Decision by Judge CABBINESS, at November Term, 1857.

James L. Johnson was arrested by virtue of a *ca. sa.*, in favor of Jason Burr, and applied to the Inferior Court to take the benefit of the Act for the relief of honest debtors.

This application was resisted by Martha C. Martin, and other creditors, on the ground of fraud in the schedule filed by the applicant.

Counsel for the defendant in *ca. sa.* claimed the right to open and conclude. The Inferior Court decided that the defendant was entitled to the opening and conclusion, and the creditors excepted.

During the trial, the Inferior Court further held and charged the jury, that defendant in *ca. sa.*, up to the *filing of his schedule*, had the right, in good faith, to dispose of all or any portion of his estate, so he did not do it to hinder, delay or defraud creditors; and he was not bound to include or insert in his schedule, property thus disposed of. To which ruling and charge counsel for the creditors excepted.

A *certiorari* was sued out by the creditors, to correct the errors complained of.

Upon the case being called for trial in the Superior Court, counsel for the defendant in *ca. sa.* moved to dismiss the *certiorari*, on the ground that due and legal notice of the application for *certiorari* had not been served upon him. It was admitted that notice of the application was given, but it was objected that said notice was not accompanied with a copy of the exceptions, or petition for *certiorari*. The Court held the notice sufficient, and overruled the motion to dismiss, and counsel for the defendant in *ca. sa.* excepted.

Upon hearing the case, the presiding Judge sustained the *certiorari* and order a new trial, on the ground that the Inferior Court erred in giving defendant's counsel the opening and conclusion; and further, on the ground that the Court erred in confining the inquiry as to what property the defendant had, to the time of filing the schedule, when it should have extended to the time of his arrest.

To which decision counsel for defendant excepted.

BECK; and ALFORD, for plaintiff in error.

MARTIN; and PEEPLES, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This case originated in the Inferior Court, being an application by James L. Johnson, to take the benefit of the Act for the relief of honest debtors. A judgment having been rendered in favor of Johnson, upon an issue of fraud, the cause was brought up by *certiorari* to the Superior Court.

[1.] A motion was made to dismiss the *certiorari* at the hearing, upon the ground that neither a copy of the bill of exceptions tendered in the Inferior Court, nor of the petition for *certiorari*, accompanied the notice of the parties' intention to apply for the writ.

We dispose of this objection summarily, by saying, that nothing of this kind is required by the law. *Cobb*, 523.

[2.] The next error complained of is, that the Inferior Court held, that counsel for the applicant was entitled to open and conclude the argument before the jury.

The rule of Court, it is true, gives this right to the movant, but this means, when the movant has something to do. In the present case, it is true, Johnson, the debtor moves to take the oath and be discharged. He has no proof to make, and nothing more to do. Now comes in another rule of practice which declares, that in all collateral issues springing out of a cause, the party holding the affirmative shall open and conclude. Is not this that case? An issue of fraud is tendered by the creditors. It is collateral to the main proceeding. It springs out of it, and arrests its progress until disposed of. The creditors hold the affirmative of the issue; for fraud will not be presumed, it must be proven. The burden of proof is upon the creditors; they, therefore, are entitled to open and conclude the argument.

These two points are matters of practice merely; the remaining ground is one of importance—it is one of principle.

[3.] The Inferior Court held, that the schedule should only contain the property belonging to the defendant at the time the schedule was filed: and that up to that time the debtor had the right to sell or mortgage his property, provided the transaction was *bona fide*, and not done fraudulently, to hinder or delay creditors. On the contrary, the Judge of the Superior Court held, that the schedule should contain all the property, money or effects which the debtor possessed at the time of his arrest; and that after that time, he had the right to dispose of his property by sale or otherwise.

With great and sincere deference to the opinion of our clear-headed, sound-minded, and exceedingly sensible brother Cabiness, we cannot concur in his view of the law in this case. Notwithstanding the arrest and imprisonment of the debtor, we entertain no doubt but that he may, up to the

time of filing his schedule, sell or mortgage his property, provided it be not done fraudulently, and to hinder and delay his creditors. Of course, we do not intend to convey the idea that the debtor can dispose of property which is covered by a judgment lien. The fourth section of the Act of 1823, (*Cobb*, 381,) is relied on by the Judge in support of his opinion. We respectfully submit, that there is nothing in this section to justify the construction put upon it. True, it speaks of rendering a full and fair schedule of the debtor's property. When? Of course, at the time the Act requires the schedule to be filed; and by looking at the oath prescribed by the statute, there can be but little doubt upon this point. What is the oath? Why, that the applicant is not possessed of any real or personal estate, debts, credits or effects, securities or contracts, "other than are contained in the schedule now delivered; and I have not directly or indirectly, since my imprisonment (or arrest) or before, sold, leased, assigned, or otherwise disposed of, or made over in trust for myself or otherwise, any part of my lands, estates, goods, stock, money, securities or contracts, whereby any money may hereafter become payable, or any real or personal estate, whereby to have or expect any benefit or profit to myself, my wife, my heirs," &c. *Cobb*, 380. That is, the debtor swears in substance, that the schedule, at the time it is delivered, contains all that the debtor then owned; and that he has not, since his arrest or before, made any fraudulent conveyance or transfer of his property, for his own or his family's benefit, or to defeat the payment of his debts.

In *Cheek vs. Dews*, 4 *Iredell's Law Rep.* 284, this identical question was decided, and upon a statute containing an oath, of which ours seems a *verbatim* transcript; and the Supreme Court of North Carolina put the same construction upon their insolvent debtors' Act that we do. The Lords' Act in England, to be found in a note to *Wendell's Blackstone*, p. 323, has received a similar exposition.

And it is right unquestionably, not only upon authority,

but upon principle. The *fi. fa.* binds all the debtor's property, from the date of the judgment; the *ca. sa.* binds nothing but the debtor's body, upon which it is executed, leaving the debtor's property to be disposed of as he pleases; still, when he comes to claim the benefit of the law passed for his relief, the debtor must bring himself within its provisions. And he does this, by swearing that the schedule *now* delivered, contains a true account, not of what he owned at the date of his arrest, but in the present tense—of what I am now possessed.

[4 & 5.] If, under the Act of 1818, an insolvent debtor may *bona fide* sell or mortgage his property, why not, and to the same extent, after his arrest, under the insolvent debtors' Act? Indeed, if the construction put upon the Act of 1818 be right, the construction put by the Circuit Judge upon the Act of 1823, is necessarily wrong; the two adjudications cannot stand together.

The Inferior Court erred in refusing to charge the jury, that if the creditors had shown, that just before the filing of the schedule, the debtor had a considerable quantity of money in his possession, it devolved upon him to account for it.

We think the *onus* was cast upon the debtor, to show what had become of this money. If he had paid it out, he could readily prove the fact. If the debtor sells property for cash, or to pay a just debt, and one owing at the time of his arrest, all these are affirmative matters, which he can show; and it is incumbent upon him to do so, if he would relieve himself from the inference of fraud.

Of course, with our view of the law, the case should be sent back to the Inferior Court, to abide another trial. And so we rule.

Judgment reversed.

Ector, transferee, vs. Ector.

WALTON ECTOR, transferee, plaintiff in error, vs. W. B. ECTOR, defendant in error.

An execution is issued in 1841—money is collected on it from the sale of defendant's property in 1846; in 1848, there is a return of *no property*; in 1850, money is raised on a *fi. fa.* in favor of the defendant, and paid over by order of Court to this execution, against him, which is receipted for on the *fi. fa.* by plaintiff's attorneys.

Held, That the execution is not inoperative under the dormant judgment Act of 1828.

Claim, from Meriwether county. Decided by Judge BULL, February Term, 1858.

In October 1841, George D. Sharp obtained a judgment against Joseph L. Welch for \$2,833 00, upon which execution was issued. This was assigned in November, 1841, by George D. Sharp to Walton Ector, for value received. In 1856, a levy of said *fi. fa.* was made by the Sheriff on certain negroes.

W. B. Ector, as guardian of Elizabeth Johnson, claimed that the negroes so levied on as the property of Welch, did not belong to him, but were the property of the said Elizabeth.

When the case came on for trial, the plaintiff in execution offered in evidence the original execution, and the record from the Superior Court of Crawford county.

The counsel for the claimant objected to the admission of the same in evidence, on the ground that the execution and judgment on which the same was founded, were *dormant*.

The Court sustained the objection, and on motion by the counsel for the claimant, granted an order dismissing the levy; to all of which rulings the plaintiff in execution excepted, and by his bill of exceptions assigned the same as error.

DOUGHERTY and BUCHANAN, for plaintiff in error.

HILL, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The question in this case is simply this, whether the action of the Court in Crawford county, saved this execution from the operation of the dormant judgment Act.

This Court when the dormant judgment Act first came before it for construction, following the lead of the Judges in convention, departed from the letter of the statute, and interpreted it by its reason and spirit. 2 *Kelly* 252. The Act declares that "all judgments that have been obtained since the 19th day of December, 1822, and all judgments that may be hereafter rendered in any of the Courts of this State, on which no execution shall be sued out, or which executions, if sued out no return shall be made, by the proper officer, for executing and returning the same, *within seven years from the date of the judgment*, shall be void, and of no effect."—*Cobb* 498.

In this case, the execution issued within seven years from the date of the judgment, and a return was made thereon, within seven years from the date of the judgment, by the proper officer executing and returning the same. The words of the Act were then fully complied with. But this Court held in *Booth and Williams*, that the entry must be made *every seven years*. Very well: to be consistent with ourselves, it became our duty to construe the Act according to its spirit, and this rule we have uniformly adhered to; commencing with the case, *Wiley et al. vs. Kelsey et al.*, 3 *Kelly* 274, where we held, that if an execution is not barred at the time it comes into Court to claim money, the statute cannot subsequently attach, pending the litigation respecting the distribution of the fund: and coming down to *Worthy vs. Lowry*, 19 *Ga. R.* 517, in which this Court adjudged, that the issuing of a *ca. sa.* was a sufficient act to keep a judgment from becoming dormant.

We cannot retrace our steps, unless we are prepared to go back to the beginning and decide, as we should have done

Ector, transferee, vs. Ector.

when the point was first presented, that an entry within seven years from the date of the judgment, satisfied the demand of the Act, and left it to the Legislature to provide, that the entry should be renewed every seven years. If the Act is worth any thing, and that it is greatly overrated, I have no doubt, its provisions should have been extended. The trouble now is, in knowing how much, and what kind of action is sufficient to answer the equity of the statute.

This Act was passed for the protection of innocent purchasers and vigilant and *bona fide* creditors. *Cobb* 496. As to the defendant in *fi. fa.*, he must be presumed to know when money belonging to him is paid out to an execution under an order of the Court. He is not therefore within the perview of the Act. Money is raised in Crawford county, in favor of Joseph J. Welch the defendant in this *fi. fa.* against Robert McCrary; and paid over to this *fi. fa.* against Welch, by order of the Court, and receipted for on the *fi. fa.* by Adams, Knight & Ector, the attorneys of the plaintiff's assignee. Is not the publicity of this transaction quite equal to a return of *nulla bona*, or a receipt of five dollars upon the execution by the Sheriff or Constable? Does it not demonstrate in point of fact, that the creditor is actively endeavoring to collect his money? What more could he do? In 1846, he received from the sale of a sorrel horse, forty-nine dollars, thirty-seven and a half cents, upon the execution.

As late as 1848, a return of no property was made upon the *fi. fa.* In 1850, he ascertains there is two hundred and fifty-six dollars and eighty-five cents raised in Crawford county, in favor of Welch, and having the oldest lien against Welch, he has this fund appropriated to the payment of his debt, under an order of the Court. All this indicates activity in enforcing his demand.

It is complained, that he did not levy earlier upon the property, which is the subject matter of this litigation. Perhaps

b.-

Cummins vs. Boston & Gunby.

a sufficient answer to that is, that so soon as the negroes were levied on, a claim was put in, and the title contested.

The Sheriff of Crawford county, who held Welch's money, should have entered the credit upon the Ector *fi. fa.* for the amount paid to it, and not the attorneys. Had that been done with the additional entry, that the sum so credited was paid out to the assignee's attorneys, all would have been right and regular, and this case never have come here. Is not this the substance of what has been done? Could it not, if necessary, be done now, by way of amendment to the Sheriff's return? Why not? There may be mistake or irregularity in this case, there is no fatal laches under the statute.

Judgment reversed

F. D. CUMMINS, defendant in *fi. fa.* and claimant, as trustee of his wife, plaintiff in error, vs. BOSTON & GUNBY, defendants in error.

[1.] Constructive notice of an unrecorded marriage settlement is sufficient to bind a *bona fide* purchaser, a *bona fide* creditor, or a *bona fide* surety, under the Act of 1847 requiring marriage settlements to be recorded.

[2.] Such notice as would excite apprehension in ordinary minds and prompt enquiry, is constructive notice,

[3.] A factor who has given or extended credit to a customer on the credit of shipments made to him, and property in his possession supposed to be his, and he subsequently received notice that the property, or a considerable part of it, is not his, which he finds to be true on enquiry, and his customer insolvent or probably so, without the property ascertained not to be his, may proceed at once, upon his own judgment, to take the usual steps for his own security.

Claim, from Spalding county. Tried before Judge CABINNESS, at November Term, 1857.

Two *fi. fas.* in favor of Boston & Gunby, against Francis

Cummins vs. Boston & Gunby.

D. Cummins, were levied upon seven negroes. as the property of defendant.

A claim was interposed by the defendant himself, as the trustee of his wife, Valinda Cummins; alleging that said slaves belonged to said Valinda, under and by virtue of a marriage agreement, executed by and between them, prior to and in contemplation of their marriage.

The *fi. fas.* both bore date 9th December, 1852, one for the sum of \$1,039 50, besides interest, and the other for \$2,000, besides interest, and were issued upon judgments confessed by the defendant.

The marriage agreement was dated 16th February, 1833, and recorded 26th June, 1852.

It was in proof that the debts or demands which were the foundation of these judgments, originated in acceptances of drafts by plaintiffs, drawn by defendant, upon cotton consigned by him to them, and the amount of which exceeded the proceeds of the cotton, which, when sold, was applied to said drafts.

There was also proof that plaintiffs received notice of the marriage agreement about the 21st or 22d March, 1851, from a person who told one of the plaintiffs that he had heard that there was a marriage contract between defendant and his wife, and that his negroes were settled on her.

It further appeared, that in 1851, defendant consigned to plaintiffs one hundred and eight bales of cotton, against which he drew a draft upon them for \$6,088 04, at forty-five days, which was accepted; draft was dated 30th January, 1851. The cotton not being sold before the maturity of this draft, a second draft was drawn in renewal, at forty-five days, dated 17th March, 1851.

The testimony is very voluminous, and as the exceptions all grow exclusively out of the charge of the Court, and its refusal to charge as requested by claimant, it is sufficient to a proper understanding of this case, simply to set out said charge.

The Court charged the jury as follows:

"In this case, two *fi. fas.* in favor of Boston & Gunby vs. F. D. Cummins, have been levied on certain negroes as the property of defendant. A claim has been interposed by him, as trustee of his wife, Valinda Cummins. He alleges, that the negroes levied on are the separate property of his wife, for whom he is trustee. This levy and claim constitutes the issue for you to try, and the question for you to decide is: Is the property levied on subject to the *fi. fas.* of the plaintiffs? It is incumbent on the plaintiffs in *fi. fas.* to show possession in the defendant at the time of the levy, or that the property in the negroes was in him at or after rendition of the judgments.

If plaintiffs have proved possession in defendant at the time of the levy, that is *prima facie* evidence that the negroes levied on are his property, and the burden of showing that they are not subject to the *fi. fas.*, is on the claimant.

You will look to the testimony to satisfy yourselves whether they were in possession of the defendant at the time of the levy, and if they were, that is sufficient to authorize you to find them subject to the *fi. fas.* unless the claimant has rebutted that testimony and shown that they are not subject.

To rebut this presumption, the claimant introduced a marriage agreement, entered into between himself, and his wife, and her trustee, before the solemnization of their marriage, by which it was agreed that the property mentioned in said agreement should be held by the trustee of his wife, for her sole use and benefit, free from any liability of his then or future indebtedness. And the validity of this instrument, or rather, notice to the plaintiffs before they gave credit to the defendant, is the point upon which this case turns.

If it was recorded in the proper office, within the time prescribed by the statute, that is sufficient notice to all persons of its existence, and creditors without any other notice are bound by it. If it was not recorded within the time prescribed by law, then it is void as to creditors who had no other notice of it at the time the credit was given.

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By the statute in such cases made and provided, all marriage agreements or settlements in existence at the time of its enactment, were required to be recorded within 12 months, and such as might thereafter be executed, within 3 months from the date of their execution; and if any such instrument be not recorded within the time prescribed, the same is of no force or effect against *bona fide* purchasers without notice, or *bona fide* creditors without notice, who might purchase, or give credit, or become security, before the actual recording of the same.

If the instrument in question was not recorded within the time prescribed by law, and if the defendant in *fi. fas.* was in possession of the negroes in controversy, and credit was given to him by plaintiffs, without notice of the existence of the marriage agreement, the instrument is void and of no effect as to them. But if they had notice of the existence of the instrument at or before the time the credit was given to defendant, they are bound by it, and the property specified in the marriage agreement is not subject to this debt. As to what constitutes notice: When an instrument, such as is now before you, is recorded in the proper office, within the time prescribed by law, that is notice sufficient to purchasers, creditors and securities. If the instrument be not recorded within the time prescribed, then actual notice must be given to purchasers, creditors and securities, to bind them, and rumor, report or hearsay is not notice; the notice must be given by some one authorized to speak; by some one who has actual personal knowledge of the existence of the instrument, and such knowledge to be communicated to creditors before the credit is given, and if it is communicated after credit is given, it is insufficient to bind them.

If the plaintiffs, after giving credit to defendant, were notified of the existence of the marriage agreement, and if they were fully apprised of the insolvency of the defendant, not by rumor, but by one who could give reliable information of the fact; if, after receiving such notice, they extended the credit

originally given to defendant, and at the same time had effects of defendant in their hands of sufficient value to indemnify themselves against loss, and neglected to do so, then the plaintiffs, upon such extension of credit, and under such circumstances, have no more right to make their money out of the property mentioned in the marriage agreement, than they would have had, if they had been charged with notice in the first instance. But to have been authorized to sell and appropriate the proceeds of the cotton belonging to defendant, to indemnify themselves for advances made or liabilities incurred, they must not only have had notice that the property in his possession was claimed by him, as trustee for his wife, under their marriage agreement, but they must also have been fully assured of his insolvency. As factors, they were bound by the instructions of their principal, and the contract between them.

They had no right to sell without his authority, except to reimburse themselves for advances made or liabilities incurred for him, and then only upon sufficient notice to him, and demand for reimbursement, and upon neglect or refusal on his part to reimburse them within a reasonable time after the maturity of the contract. If the defendant was notoriously insolvent, and knowledge of the fact was brought home to them, they could then, and only then, have sold to reimburse, without notice to him.

You must be fully satisfied of the existence of all these facts, and the proof must be such as to satisfy the minds of reasonable men, before you can hold the plaintiffs affected with such notice as to discharge the property which has been claimed. You will apply the law, as it is given to you by the Court, to the facts in this case; of the facts, you are the exclusive judges. It is your province to determine what facts have been proved, and then apply the law. If the marriage agreement between defendant *in fi. fas.* and his wife, was not recorded within the time prescribed by the statute, the plaintiffs, as his creditors, are not bound by it, unless they

had actual notice of its existence before credit was given, and this notice must have been given by some one who, from his own personal knowledge, could communicate the fact. If the plaintiffs had such notice, you will find the property not subject; if they had no such notice, you will find it subject.

Claimant's counsel requested the Court to charge the jury, that when husband and wife live together in the enjoyment of personal property, and the wife has the equitable title, the possession is to be considered as subordinate to her title, and his possessions, hers; which the Court refuses to give, but charges the jury, that the legal title is in the trustee, and the possession accompanies the legal, and not the equitable title.

Claimant's counsel also requested the Court to charge the jury, that the Act of 30th December, 1847, which makes unrecorded deeds void as to creditors, means creditors of the grantors; which charge the Court refused to give."

To which charge and refusals to charge claimant excepted.

The jury found the property subject to the *fi. fas.* Whereupon, counsel for claimant tender their bill of exceptions, and allege as error the charge and refusals to charge above excepted to, and the finding of the jury.

GREEN; and MARTIN, for plaintiff in error.

ALFORD; and FLOYD, *contra.*

By the Court—McDONALD, J. delivering the opinion.

In discussing the charge given to the jury by the presiding Judge in the Court below, we must examine the Act requiring marriage settlements to be recorded, in order to determine the kind of notice contemplated by that Act to bind *bona fide* purchasers, creditors and sureties. Antenuptial marriage settlements are made upon valuable considerations and prior to the Act of the Legislature of 1847, there was no Act requiring them to be recorded. They were good con-

veyances, for valuable consideration, and, when free from fraud between the parties, bound every body. In this State, all the property of the *feme* on marriage vests in the husband. The possession of the property by the husband after marriage, is the *indicium* of property in him, and, without explanation, it is presumptively his absolutely. But this presumption was held not to affect the rights of the wife as she ceased to be *sui juris* on her marriage, and became incapable of performing a legal act or of procuring for herself legal protection, and purchasers, creditors and sureties, were subjected to great injuries, by ignorantly supposing the property to be the husband's. To remedy this evil, that Act was passed, and it is a matter of much importance, to settle the kind of notice which satisfies the statute, whether it be actual or constructive. We think there can be but little doubt on that point. The legal ability of the wife to act for herself continues to be the same since the enactment of that statute, that it was before. She cannot control her trustee, of herself, in the execution of the duties he undertook to perform by the acceptance of the trust, and if, as in this case, the law, by the death of the trustee, vests an insolvent and, therefore, irresponsible husband with the trust, under whose legal dominion the wife is, she is powerless in contemplation of law as to her legal rights. Her condition, then, requires, that in construing the statute, we should not extend it against her beyond its letter.

[1.] We shall proceed then to a brief analysis of the Act. The two first sections require that marriage settlements shall be recorded. The third section declares the consequence of a failure to record. A settlement not recorded shall not be of any force or effect against a *bona fide* purchaser without notice, a *bona fide* creditor without notice, or a *bona fide* surety without notice, who may purchase, give credit, or become surety before the actual recording of the same. It is manifest, that if the settlement be recorded, the registry would be sufficient notice and all that the statute requires. It cannot

be questioned, but that the registry would be constructive notice only. It is certainly not actual notice. It is just to say then, that the kind of notice meant by the statute, is that which is equal to a registry—a constructive notice.

[2.] Our conclusion is, that any notice is sufficient, or in other words, amounts to constructive notice, which would excite apprehension in ordinary minds, and prompt enquiry into the actual condition of things; and that information for such purpose may be communicated by a person, whether he have personal knowledge of the fact, or be specially authorized to speak or not, provided it be given by such a man and in such terms as would induce a person of ordinary prudence to enquire into the matter, we think that the Court ought so to have instructed the jury, and that the charge that the law required actual notice was too strong. The Legislature intended to protect the description of persons mentioned in the statute, from imposition and injury, and not to arm them with power to commit a fraud.

Wm. W. Chapman testified that Mr. Boston spoke to him of his acceptances on drafts of plaintiff in error drawn on cotton and that, he informed him that Cummins had no property except a house and lot, and that he had heard that his negroes were settled on his wife. It is true that he said he knew it only from hearsay, but it did put him on enquiry, for he enquired immediately of Chapman, the value of the house and lot, and on being informed that it was worth about \$800, replied that he thought he was good—that he was holding about 110 bales of cotton for him.

We think that the charge of the Court in regard to the right of the consignee to dispose of the produce in their hands for their indemnity, and of their duty to do it, should be modified to suit the views expressed by us in respect to the notice required by law, with a slight change in regard to the substance. We think that the consignees ought, if the notice received by them was such as would have induced a man of ordinary prudence, to have enquired into the matter, to have

sought information of the wife, within a reasonable time, in relation to the trust; and of any one probably knowing the circumstances of the consignor, as to his solvency, and if the enquiry resulted in information that the property was secured in trust to the wife, or if there was a part not so secured, and they were satisfied of the insufficiency of the part not secured to protect them, they might proceed at once to dispose of the effects in hand for their own security, whether the credit had been extended or not, unless the credit had been extended with a knowledge of all the facts; or independent of any consideration of security afforded by the property.

In that case they should act on their own judgment, as they would on their own responsibility so far as their right to claim indemnity for a balance, from the trust property, is concerned.

Agreeing mainly with the Court below on other points insisted on in argument by plaintiff in error, we simply say that we reverse the judgment on the points above examined.

Judgment reversed.

DEATH OF JUDGE STARK.

SUPREME COURT OF GEORGIA,

ATLANTA, MONDAY, MARCH 29, 1858.

The Honorable the Supreme Court met pursuant to adjournment. Present, their Honors, JOSEPH H. LUMPKIN, CHARLES J. McDONALD, and HENRY L. BENNING, Judges.

The Hon. O. C. GIBSON, in announcing the death of Judge STARK, said—

“For a long series of years Judge Stark has been in our midst; we have been intimate with him and have known him well. He has risen by his own efforts. He struggled for it, and arrived at the very highest point in his profession. He was a *Lawyer*.

“For a number of years he was the presiding officer in his Judicial district, and none, I believe, ever filled that bench more to the satisfaction of all concerned, than did Judge Stark, and that satisfaction arose from the fact, that, in every sense of the word, he was able to fill that position.

“In all the varied relations of life he was a model man. In every respect he was a citizen and patriot. None, I reckon, have ever left a better record than did our brother. He retained the powers of his mind almost to the very last moment. He called his family around him, and in that way peculiar only to a man who has been prepared from “On High,” he left his blessing upon them. He prayed his blessing upon his country. He died a patriot and a Christian.”

Upon motion, the Court appointed the following members of the bar, a committee to report resolutions appropriate to the occasion, viz :

MESSRS. GIBSON, UNDERWOOD, WARREN, B. HILL, FLOYD, COOPER, HALL, HAMMOND, CHISOLM, and GREENE.

TUESDAY, 30th March.

The committee above appointed submitted the following report and resolutions on the death of the Hon. JAMES H. STARK.

In the Providence of our Divine Master, we have been again called to dwell in sadness upon the manly virtues of another of our professional brethren: The Honorable JAMES H. STARK, for many years the able and distinguished Judge of the Flint Circuit, and afterwards an ornament to the bar of this Court, is dead—he departed this life at his own house in Griffin, on the 23d of February last, surrounded by all the outward comforts which can smoothe the pathway to the Tomb, and sustained by all the graces which adorn the Christian's exit from time to eternity.

Judge STARK possessed a vigorous and commanding intellect, a broad and comprehensive understanding, which by close and assiduous culture, ripened and matured year by year as he grew older, rendering him at the time of his death one of the brightest lights of the profession in the State.

In mental discipline and legal reading, he was the peer of the best; in faithfulness, and vigilant attention to the conduct of his cause, and the interest of his client, he was inferior to none.

Entering upon the earnest battle of manhood while he was yet a boy, with no mentor, but his own manly heart, and clear analytical brain, he won success, from the hard hands of scanty fortune, and crowned with honor to himself and profit to his country, its glittering gem, in the humble habit of a Christian gentleman. Self-reliant and strong physically, mentally, and morally, he was a brilliant example to his younger brethren of the bar, of what may be accomplished by an active will, and a determined purpose; pressed forward under the light of sturdy virtue and correct principles.

Having none of the artificial manœuvres, which are found in courtly drawing rooms to win applause from thoughtless idlers, his was a carriage and deportment which grew upon you at successive intervals by the mild light of generous goodness and truthful manliness.

In his practice he was obedient to the injunction of the great STONY,

When'er you speak *remember*, every cause
Stands not on eloquence, but stands on laws,
Pregnant in matter, in expression brief,
Let every sentence stand in bold relief.

His was an earnest search for the truth—he had no quibbles or artifices; he found the strong points of his case, and he put his cases upon them—he met his adversary without evasion, and his success at the bar abundantly vindicated the justice of his theory, and the wisdom of its adoption.

In all the dearer, and better relations of patriot, Christian, master, husband and father, our deceased brother was a model. Kind and forbearing, earnest and forgiving, he gathered around him in the cherished circle of neighborhood and home, the fondest affections of friendship and love. Honest, religious and brave, he met the stern approach of death with the philosophy of enlightened heroism and the calm fortitude of the departing Christian; calling his family around him, one by one, he offered for each, and for all, the hearty, fervent offering of a good man's prayers. Then breathing an earnest invocation to the God of nations for blessings upon his country, and her noble institutions, with a parting sigh and his last amen, he died.

Resolved, That we have heard with sorrow, deep and abiding, that our loved and honored brother STARK is no more

Resolved, That we will cherish in our hearts best recollections, a warm and enduring remembrance of his manly virtues in his earnest and strongly marked character.

Obituary of Judge James H. Stark.

Resolved, That we tender to his afflicted family and mourning friends our sincere sympathy in this their great bereavement.

We request that these proceedings may be entered upon the minutes of this Court, as a perpetual memorial of our regard for our excellent and distinguished associate, and that a copy of the same may be furnished the family of the deceased.

JUDGE LUMPKIN'S RESPONSE.

Another gifted man is gone—another genial spirit departed! JAMES H. STARK is cut off from the living, and who shall declare his generation?

Few possessed in the same degree, those qualities of head and heart which win the love and esteem of all. Has the city of his residence ever witnessed such a funeral? It was a becoming tribute to one of Georgia's most popular citizens. The bar of which he was a distinguished ornament, the various fraternities to which he belonged, the Church of Christ, to which he dedicated himself twenty years ago, the community in which he was so general a favorite, all united in weeping over the grave of a common benefactor and friend!

I never approach a task like the present, but with mingled feelings of pleasure and pain. From my deep attachment to my brethren of the bar, I cheerfully contribute my mite on these melancholy occasions, in order that our names may live together, when our earthly connection is dissolved. But who is sufficient to exhibit even an imperfect outline of the private and professional character and position of so many legal luminaries; who, while living, attracted so large a share of public attention, and the impression of whose rare qualities remain too fresh upon the recollection, to enable one to

present a picture which will not fall short of public expectation, as well as the merits of the individual designed to be commemorated?

But to portray the peculiarity of each, would be to overlook all which constitutes the distinction between men. What makes one man differ from another? Such a painting would convey no likeness of the original, and make it as flat as the canvass on which it is delineated. Would that I had the genius of Plutarch, that I might sketch properly the lives of those deceased worthies who have adorned, by their learning and eloquence, the jurisprudence of our State!

I am cheered, however, by the thought, that to fail in such an effort, where there is so little chance of success, reflects no disgrace. Without dwelling longer, then, upon the difficulties of the undertaking, or excusing in advance its imperfect performance, we proceed to discharge our duty, which is to pay a grateful and sympathetic tribute to departed worth.

Although I have known the deceased long, still, as we lived remotely from each other, my associations have been less intimate with him, than many others who were his circuit companions. It is only as a member of this Bar that I have had the opportunity of appreciating his merit as a man, and his skill as a lawyer.

Like CRAWFORD, and GILMER, and WARNER, and UNDERWOOD, and BAILEY, and LAW, and HILL, and HOLT, and a number of the most prominent men in every department of life, Judge STARKE commenced his career at fifteen years of age, as a teacher of youth, and followed this occupation for five years, an employment eminently adapted to qualify men for future professional distinction. Having studied law with Governor NOBLE, of South Carolina, his native State, he was admitted to the Bar at twenty-one years of age, and emigrated immediately to Butts county in this State, where he spent the prime of his manhood.

The new portions of Georgia, as they have been successively acquired from the Indians, the Ocmulgee, the Flint,

South-Western and Cherokee territory, have opened the same field for enterprise and talent, that new countries always afford to an older and more dense population. And how many of the men who have exercised a controlling influence in this State, are indebted to this circumstance for their success and elevation in life? A virgin soil subdued to a high state of culture, a wilderness made to bloom and blossom as the rose; this is the true process for developing and stimulating to their full proportions and growth the mental, moral, and physical capacities of men. It imparts a hardihood, robustness, simplicity, and manliness to character, unattained in an effete population, sinking under the decrepitude of age. Disregarding and despising the artificial forms and gewgaws which engross so much of the time and thought of what is falsely, perhaps, called a higher civilization, but which tends so much to dwarf the intellect, and surrounded by all those natural scenes of beauty and sublimity, the native forests, the running streams, the waterfalls and mountains, spread out by the hand of the great Architect, these pioneers attain to a stature which commands respect and insures promotion. The contrast between such men, and those of a society, waning and waxing old by lapse of time, is that which exists between the bird of Jove, scaling the blue vaults of Heaven, and the canary entrapped and consigned to its gilded cage.

To the business of teaching, then, and his emigration to what was at that time a new country, our brother, like so many others, is mainly indebted for his success and distinction. "The gods are ever with the brave."

The mind of Judge STARK, while quick to apprehend a legal proposition in all its bearings, without even seeming to analyze it, was nevertheless cautious in its conclusions. He seemed always to have examined a point thoroughly, before he pronounced his opinion. His thorough preparation always indicated this, for he never failed to fortify with clear and cogent argument, as well as authority, the positions he

sought to establish. And although his fancy was playful, and even at times brilliant, and he never failed to deck with the choicest flowers the thread of his discourse, still, it was manifest that his sound judgment had guided his researches. And to say of one that he excels in that finest and rarest of intellectual faculties, a sound judgment, is to award the highest praise. In every condition of life, public or private, it is worth more than learning, or wit, or invention, or any other mental endowment. Logic may fail to convince, eloquence to persuade, or imagination to charm, but a good judgment never fails to win the prize, and confer superiority upon its possessor.

As a lawyer, Judge STARK was candid and fair. He dealt in facts and truth. He was extremely courteous to the Bench and Bar. His very nature revolted at the idea of an undue advantage. He spurned the thought as beneath him. His gallant spirit sought an open field and a fair fight, and none dealt thicker or heavier blows. He was a Hercules in the Forum as well as at the Hustings. Would that all lawyers were like him, practicing no trickery himself, and ever ready to denounce it in others, never knowingly taking an untenable position, or persevering in error when pointed out. In a word, it may be truly said of STARK, he was an honest lawyer, an honest man.

Man was made to work. In his primeval and perfect state, he was commanded to subdue the earth. "His mind is a mine of wealth." And he that would gain distinction, must earn it by unceasing industry. Judge STARK acted upon this principle.

His uprightness, ability, and impartiality as a Judge, were never questioned. His sole aim was to ascertain what the law was, and then to administer it without fear or affection, partiality or prejudice, for or against either party.

As a legislator, our statute books and public archives abound with the evidences of his statesmanship.

Shall I attempt to portray his private virtues? He certain-

♦

ly possessed in an extraordinary degree, those qualities which acquire and secure favor. His manners were frank and polite, his conversation sparkling and vivacious, his temper amiable and benevolent. Who labored more constantly and diligently to make all cheerful and happy around him? Without malice and without guile, he had a large loving heart. He had a kind word and helping hand for all. It is not strange that such a man should have a host of attached friends, of whose circle he was always the chosen and cherished center, and that he left not an enemy behind!

One of the most beautiful portraits of a good man, to be found upon record, is in the book of Job: "When the ear heard me, then it blessed me, and when the eye saw me, it gave witness to me, because I delivered the poor that cried and the fatherless and the blessing of him that was ready to perish came upon me, and I caused the widow's heart to sing for joy. I was eyes to the blind, and feet was I to the lame. I was a father to the poor, and the cause which I knew not I searched out. Then said I, I shall die in my rest."

Much of this picture is peculiarly applicable to the lamented dead. A friend to the poor, he was no foe to the rich; considering himself on a level with the highest, he was not above the level of the humblest. He was fortunate in enjoying the confidence and favor of both; and he did die in his rest. He died as he had lived, in the bosom of an idolizing family surrounded by those he so much loved, and for whose comfort he had toiled so long and indefatigably. In his last moments, they knelt around his bed, and he uttered a fervent and soul stirring prayer for each member of it individually; and then he implored a blessing upon his beloved country. How well this closing scene comported with the character of the man! May that prayer be heard!

But the learned lawyer, the just Judge, the enlightened legislator, the public spirited citizen and patriot, the generous and charitable neighbor, the fast friend, the faithful and fearless Christian, the merciful master, the fond father, the

tender and devoted husband, has passed away; and the place that once knew him shall know him no more forever. And it becomes us to bow submissively to the will of Him who suffereth not a sparrow to fall to the ground without His Divine permission, who doeth all things well.

Gentlemen, let your report and resolutions be entered upon the minutes of the Court as a perpetual memorial of the virtues of the deceased—and to be remembered and imitated by us, his surviving brethren. And may his memory be embalmed in our hearts, that our last end may be like *his!*

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA
AT MILLEDGEVILLE.
MAY TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

WM. W. Ross, et al. plaintiffs in error, vs. MARTHA B. Ross,
defendant in error.

Stock in the Eatonton Branch Railroad, is not subject to garnishment, at the in-
stance of creditors of the Stockholders.

Attachment, from Putnam county. Decided by Judge
HARDEMAN, March Term, 1858.

An attachment was sued out by Martha B. Ross, suing for the use of George W. Ross against William W. Ross and Francis D. Ross, residing without the limits of the State of Georgia, on a promissory note for \$500 and interest. On this attachment was issued ; a summons of garnishment, directed to The Eatonton Railroad ; the summons was served on Michael Dennis, President of the Eatonton Branch Railroad. He answered that William W. Ross was the holder of fifty shares of stock in the said Road, and that Francis D. Ross was the holder of forty-eight shares therein, and that

in other respects, if in this, the said road did not owe and had not owed either of them, or had any effects of either of them.

When the attachment came on to be heard, the defendant's counsel moved the Court to dismiss the same on the following grounds:

1st. That it appears to the Court that said attachment was served on the shares of defendants, as stockholders in the Eatonton Branch Railroad, by a summons of garnishment directed to said Eatonton Branch Railroad.

2d. Because the shares of a stockholder in a corporation cannot be levied on by an attachment, neither directly nor through the means of a summons of garnishment issuing under said attachment.

3d. Because it appears that said attachment was served by a summons of garnishment, directed to the Eatonton Branch Railroad.

4th. Because said summons of garnishment being directed to the Eatonton Branch Railroad, was served upon the President of said road, and not by leaving the same at the place of transacting the usual, and ordinary public business of said corporation, the same being within the jurisdiction of said Court.

The Court overruled this motion, and the case having been proceeded with, a verdict was rendered for the plaintiff.

To this decision of the Court the defendants excepted, and filed their bill of exceptions, assigning the same as error.

DAVIS & LAWSON, for plaintiffs in error.

HUDSON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in overruling the motion to dismiss the attachment?

One of the grounds of the motion was, that stock in this

railroad is not subject to garnishment by creditors of the stockholders. Was this a good ground?

The answer to this question, depends on the import of the act of 1856, "to authorize the issuing of attachments and garnishments," &c; for, the 55th section of that act, repeals "all acts, and parts of acts, upon the subject of attachments and garnishments." Acts of 1856, 38.

By the 13th section of this act, the summons of garnishment, is to be "directed to any person who may be indebted to, or have property or effects, of the defendant, in their hands."

By this section, then, it would seem, that *all* of the debts, property, and effects, of the debtor, are subject to garnishment.

But the 16th section says, "where the garnishee appears and answers that he is indebted, or has property, or effects in his hands, belonging to the defendant in attachment, judgment shall be rendered against him, in favor of the plaintiff, for such acknowledged indebtedness, and the property and effects, whatever they may be, shall be delivered into the hands of the Sheriff," &c.

Where the answer is, that he is, "indebted," judgment is to be entered against him, "for such acknowledged indebtedness."

Is stock in this railroad such a debt, ("indebtedness,") of the railroad to the stockholder, that a garnishing creditor of the stockholder, can enter up judgment for it, against the railroad? It is not; it is a debt which, the railroad dares not pay even to the stockholder himself; the road may pay him *dividends* on it, but that is all. See *charter, section, 3, Acts of 1850, 240; and charter of Central Railroad, Rule 7, (Pr. Dig. 330.)*

The debt which a corporation owes to one of its stockholders for his stock, is a debt of a peculiar nature. It is a debt not to be paid, until the corporation comes to wind itself up. When the corporation winds itself up, then it pays back



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to its stockholders, the money, it received from them for its stock; during its existence it may pay them the profits which it makes on their money, but anything beyond the said profits, it dare not pay them. This is generally true. It is true in the case of this corporation.

When will this corporation wind itself up? It may never do so. Its charter sets no limits to the time of its existence. *Pr. Dig.* 333.

It follows, that the time may never come, when this corporation will be bound to pay back to the Rosses, the money it received from them for their stock. If so, of course, no judgment can be got against the corporation, requiring it to pay that money at any particular time; consequently, no judgment can be got against the corporation, under the said 16th section of the act, for the judgment it contemplates is one requiring immediate payment.

There is no other part of the act under which such a judgment can be got.

We may conclude, therefore, that although, the language of the 13th section of the act, is broad enough to include all debts, yet that the 16th section of the act is such, as to require this language to be so restricted, that it shall not include such a debt as this; a debt which a corporation owes to one of its stockholders, for the money received from him for his stock.

If dividends were due to the Rosses, the case would be different. Dividends, there is little doubt, stand on the same footing as ordinary debts due from the corporation to its stockholders.

The judgment that is needed in such a case as the present, is a judgment authorizing a *sale of the stock*. There is no law authorizing such a judgment in attachments or garnishments, 16 *Ga.* 437. There is a law making "bank and other stock, subject to execution." *Cobb, Dig.* 511. But this law, does not reach the present case.

We think, then, that this stock of the Rosses, was not sub-

Thornton (a slave) vs. The State of Georgia.

ject to this garnishment, and, therefore, that the Court erred in not dismissing the attachment.

It becomes useless to consider the other grounds of the motion.

Judgment reversed.

THORNTON, (a Slave,) plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] The offence of being an accessory before the fact in murder, is one that may be committed by a slave; and one which, if committed by a slave, is to be punished with death.

[2.] A slave convicted of murder, but not sentenced, is a competent witness for the State, on the trial of another slave indicted as accessory before the fact in the murder.

Accessory before the fact to murder, from Greene county.
Decided by HARDEMAN, March Term, 1858.

Thornton, a slave, was indicted as accessory before the fact to the crime of murder, in abetting and procuring a negro slave, John, to commit the murder.

Upon his arraignment, and before pleading to the indictment, Thornton and his master, Robert C. Daniel, demurred and excepted to the same, on the grounds that there was no offence set forth and charged in the said indictment, of which the accused could be prosecuted, corrected or punished, and that the offence of accessory before the fact, which was the offence set forth and charged in the indictment, was an offence that could not be committed by a slave, and that a slave was not liable to be prosecuted or punished for said of-

Thornton, (a slave,) vs. The State.

fence, the crimes and offences prescribed by the penal code being alone applicable to free white persons, and not to slaves or free persons of color.

After argument on this demurrer, the Court overruled the same, and the defendant excepted.

The accused then pleaded not guilty to the indictment.

In the course of the trial, the State offered as a witness, a negro slave of the name of John, who had been convicted of the murder for which the accused was indicted as accessory before the fact, but on whom judgment had not been passed.

Counsel for the accused objected to the competency of this witness, on the ground of his having been convicted of the crime of murder as aforesaid.

The Court overruled this objection, and decided that the said slave John was a competent witness, and the defendant excepted.

The defendant was found guilty and sentenced to death.

Counsel for defendant thereupon filed his bill of exceptions assigning the above rulings and decisions of the Court as error.

CONE, for plaintiff in error.

LOFTON, Sol. Gen., *contra*.

By the Court.—BENNING, J. delivering the opinion.

Is the offence of being an accessory before the fact in murder, one that can be committed by a *slave*? If it is, is the punishment *death*?

In 1821, the Legislature declared, that "murder of a free white person," "when committed by a slave," should be a capital offence. *Cobb Dig.* 995.

Does the offence of murder, as here declared, include the offence of being an accessory before the fact in murder? If it does, both questions are to be answered in the affirmative.

The Legislature, doubtless, meant by "murder," what was murder by the law, as the law then was; namely, in 1821.

The law as it then was, was the code of 1817. Did murder, by that code, include the offence of being an accessory before the fact in murder?

The first section of the second division of the code, is as follows: "An accessory is he who stands by, aids and assists; or, who not being present, aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime. He or she, who thus aids, abets, or assists, shall be called a principal in the second degree."

Here, advisers *before* the fact, that is, accessories before the fact, and aiders *at* the fact, are placed on the same footing, and equally made *principals* in the second degree.

But by the common law, a principal in the second degree, in murder, was a murderer, and might be charged in the indictment, as being guilty of murder. 1 *Chitty Cr. Law* 260; 1 *Arch. Cr. Pr. and Pl.* 13, 14.

It would seem to follow, that, by the code of 1817, murder included in itself, the offence of an accessory before the fact in murder.

Again, the code of 1817, nowhere prescribes in so many words, any punishment for what it thus, calls, principals in the second degree. It merely defines offences, and affixes to them, punishments. Therefore, unless we say, that these defined offences, include within themselves, the offence of the principal in the second degree, as well as the offence of the principal in the first degree, we say, that the offence of the principal in the second degree, was to go unpunished. But we are not at liberty to say, that the legislature intended the offence of the principal in the second degree, to go unpunished. If such had been its intention, it would not have devoted a whole division of the code, to "accessories in crimes."

The English Courts hold, that, "when an offence is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning

of the statute as much as the parties who actually commit the offence." 1 *Arch. Cr. Pr. & PL* 13. *The Coalheavers' case*, 1; *Leach Cr. cases*, 64; *The King vs. Taylor & Shaw*, and note, *Id.* 360

It is true, that the code of 1833, makes accessaries before the fact, a class by themselves; but, so far as punishment is concerned, it makes no distinction between them, and aiders and abettors at the fact, whom alone it calls principals in the second degree. *Cobb Dig.* 781. This may also be said of the common law. 3 *Black. Com.* 39.

[1.] We think, then, that by the act of 1821, a slave may be guilty of the offence of being an accessary before the fact in murder; and that when one is so guilty of that offence, he is to be punished with death.

And the act of 1821, is the act which is to govern; for it is the latest. If, therefore, there is, in the second section of the act of 1816, "for the trial and punishment of slaves," anything repugnant to the act of 1821, that thing is to be disregarded. Perhaps, the maxim, "A statute which treats of things or persons of an inferior rank cannot by any *general words* be extended to those of a superior," (1 *Black. Com.* 88,) is sufficient to authorize us to say, that there is nothing in that section repugnant to the act of 1821.

[2.] Was John, the slave who had been convicted of the murder, but on whom sentence had not been passed, a competent witness for the State? We think that he was. The common law says, that what works the disqualification to testify, is, not the verdict, but the *judgment*. 1 *Green Bv. Sec* 375.

It is much to be doubted, whether our statute law is not such, that it will not permit even the judgment to work the disqualification.

The act of 1816, "to carry into effect the penal code," provides, (and seemingly, as a matter of course,) for taking the testimony of *convicts in the Penitentiary*. *Cobb Dig.* 266.

The Code of 1833 declares, that any person who shall be convicted of perjury, false swearing, or subornation of perjury, shall, in addition to the punishment specified for those offences, be forever disqualified from being a witness in any matter in controversy. *Cobb Dig.* 804. And *inclusio uni-us, exclusio alterius*.

"On the trial of a slave, or free person of color, any witness shall be sworn who believes in God and a future state of rewards and punishments." *Sec 5 of Act of 1816 for the trial &c. of slaves. Id.* 988.

We agree, then, with the Court below, and affirm the judgments excepted to.

Judgment affirmed.

DAVID M. LAFITTE, Plaintiff in error, vs. ALEXANDER B. LAWTON, defendant in error.

[1.] Marriage settlements, when there is any doubt in regard to their construction, must be expounded so as to give effect to the intention of the parties, and the word "issue" is often used as a word of purchase, and must be frequently so interpreted.

[2.] A marriage settlement was entered into between A. B. L., the husband, and M. E. B., the wife, by which the wife's property was conveyed to a trustee upon the following trusts, to-wit: 1st. A. B. L. is to be permitted to have, receive, take and enjoy the interest and profits to and for the joint use, benefit and support of the said A. B. L. and M. E. B., the intended wife, and the issue of the marriage (if they should be blessed with any,) during the life of the said A. B. L. 2d. After the death of the said A. B. L., the trustee to hold the trust for and to the use, benefit and support of the said M. E. B. (should she survive him) and the issue of her body by the said contemplated or any future marriage (if she should be blessed with any) during the life of the said M. E. B. 3d. After the decease of the said M. E. B., the trustee to hold in trust for and to the use, and support, and benefit of the issue of the body of the said M. E. B. by the said contemplated or any future mar-

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riage, if she should be blessed with any. M. E. B. died in the lifetime of A. B. L. There were issue of the marriage.

Held, that the issue of the marriage took the whole of the estate subject to the interest of A. B. L. as expressed in the settlement.

Injunction, from Thomas county. Decided by Judge LOVE at Chambers, 25th January, 1858.

The questions in this case arose upon the construction of a marriage settlement executed in South Carolina in contemplation of the marriage of Alexander B. Lawton and Mary Elizabeth Brisbane on the 20th day of May, 1829. By this settlement, certain property therein described was vested in Wm. H. S. Brisbane, his executors, administrators and assigns, upon certain trusts, of which the following only are material to the present case. "That is to say, in trust for the said Mary E. Brisbane until the solemnization of the said intended marriage, and from and immediately after the solemnization of the said intended marriage then in trust, that he, the said Wm. H. Brisbane (trustee) his executors, administrators and assigns shall and do permit the said Alexander B. Lawton to have, receive, and take and enjoy all the interests and profits of the said property to and for the joint use, benefit and support of the said Alexander B. Lawton and Mary E. Brisbane, his intended wife, and the issue of their marriage (if they shall be blessed with any) during the life of the said Alexander B. Lawton, and after his decease, in trust for and to the use, benefit and support of the said Mary Elizabeth Brisbane (should she survive him) and the issue of her body by the said contemplated or any future marriage (if she should be blessed with any) during the life of the said Mary Elizabeth Brisbane, and after her decease in trust for and to the use, support and benefit of the issue of the body of the said Mary Elizabeth Brisbane by the said contemplated or any future marriage."

Mary Jane Lawton, a child of this marriage, intermarried with David M. Lafitte, and after the death of her mother

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had a child and died. Shortly after this child died in infancy, leaving its grand-father, the said Alexander B. Lawton, and its father, D. M. Lafitte, surviving.

The bill in this case was filed by D. M. Lafitte against Alexander B. Lawton for an account and payment of the accumulated rents and profits of one-third part of the trust property which had accrued since the death of the said Mary E. Lawton, and also claiming to receive for the future the annual rents and profits of the said one-third part of said trust property, till the death of the said Alexander B. Lawton, and also for an injunction restraining the said Alexander B. Lawton from selling or removing the trust property, claiming a remainder in fee to one-half of the same, after the death of the said Alexander B. Lawton.

The complainant, by his bill, also stated that there were two children of the marriage living at the time of the decease of the said M. E. Brisbane, and charged that the said A. B. Lawton had several times endeavored and threatened to sell the trust property.

The Court below refused to grant the injunction on two grounds :

- 1st. Because "the equities in said bill are uncertain."
- 2d. Because "even if the equities are certain, the allegations in said bill are insufficient to authorize the extraordinary process of injunction."

To these rulings of the Court, complainant's counsel filed his bill of exceptions, saying that the Court erred :

- 1st. In refusing said injunction."
- 2d. In ruling that the equities in said bill are uncertain.
- 3d. In ruling "that even if the equities are certain, the allegations are not sufficient to authorize an injunction."

EUGENE H. HINES appeared for the plaintiff in error.

A. R. LAWTON, *contra*.

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By the Court.—McDONALD J. delivering the opinion.

Whether the Court ought to have granted to the complainant the remedy by injunction, depends on the construction which ought to be placed on the marriage settlement; for if he has rights under that settlement, which entitled him to a future enjoyment of the property, or a part of it, the allegations in the bill of the defendant's appropriation of the property to his own use, a sale of part of it and threats to sell more, and denying the complainant's right, are sufficient to entitle him to an injunction, and the Court below ought to have awarded it.

[1.] This contract having been made in South Carolina by parties residing there at the time, it must be construed according to the laws of that State, though we do not say that it would be subject to a different interpretation if it had been executed in this State by parties resident here. Our first duty is to affix a meaning to the term "issue," as used in the marriage settlement. It occurs in four different places. The word "issue," in *legal* construction, is a word of purchase. *Fearne on Rem.*, 106. It is a less technical expression than heirs of the body; but it is often a word of limitation, and sometimes it cannot be otherwise construed. The terms "heirs of the body" have been held, in South Carolina, to be words of purchase, when used in a marriage settlement.

The Court in that case said that "it being a case of marriage settlement, makes it a strong case in favor of children who are deemed purchasers for valuable consideration." *Garner vs. executors of Garner*, 1 *Dess. Rep.* 437, 444. In the case of *Doe ex dem Cooper vs. Collis*, Lord Kenyon said "that in a will, issue is either a word of purchase or of limitation, as will best answer the intention of the devisor, though in the case of a deed it is universally taken as a word of purchase." 4 *Term Rep.* 299. "In marriage settlements the most favorable exposition of words will be made to support the intention of the parties." 2 *Dessaus*

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Rep. 125, 126. "Marriage is the highest consideration ; provision for the children is the immediate object of settlements, and is intended as an effectual provision. The issue are purchasers for a valuable consideration." *1st Dess. Rep.* 443. The word issue in the instrument under consideration, in the three places in which a benefit is secured to them, is a word of purchase. Alexander B. Lawton having survived his wife, the subsequent trusts for her and for the possible issue of any future marriage need not be considered, except as auxiliaries in interpreting the settlement.

[3.] The legal interest and estate in all the property and choses in action, the subjects of the trust were conveyed to William H. Brisbane. He was to permit the said Alexander B. Lawton, after the solemnization of the marriage, to have, receive, take and enjoy all the interests and profits of the said property to and for the joint use, benefit and support of the said Alexander B. Lawton and Mary Elizabeth Brisbane (the wife) and the issue of their marriage (if they should be blessed with any) during the life of the said Alexander B. Lawton. The trustee was to permit Lawton, during his life, to receive the interest and profits, not to his own use, but to the *joint* use, benefit and support of himself, wife and the issue of the marriage, if any. The death of the wife, in the lifetime of the husband, could not divest the issue of the marriage of their interest under the terms of the settlement, nor enlarge the interest of Lawton into a fee for a part or the whole of the property. His interest remained the same, unaffected by that event.

Had Lawton, the husband, died, leaving his wife surviving him, the trust was to remain for the use, benefit and support of the wife and her issue by her first or any other marriage ; and lastly, after her death, for the use and support and benefit of the issue of the body of the wife by any marriage. Looking through the whole instrument, it was clearly the intention of the parties, that the parents respectively should have an usufructuary interest in the prop-

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erty during their lives, if there were issue of the marriage, jointly with the children, and that there was no such limit to the interest of the children. Provision for the children was the immediate object of this settlement, and it was intended as an effectual provision.

If there had been no issue of the marriage, the marital right of the husband would have attached to all that part of the property not effectually limited over; but the provision for the children bars that right of the husband. It is his agreement that it should do it, and the property vested in them subject to the interest of the husband, as expressed in the deed of settlement. I acknowledge that I had some doubt on the terms of this settlement and the facts of this case, if the subsequent provisions of the deed, even by aiding in ascertaining the intention of the parties, could prevent the husband from sharing the property with the issue of the marriage; but I yielded that to the strong conviction of my brethren, that the husband could not take more than a life interest in the property, and that to be shared with the issue of the marriage.

The children do not claim, as contended for by plaintiff in error, *through* the husband. The entire property proceeded from the wife. She did not secure more than a life interest in it to herself, and she could not have intended a greater for her husband. On this application for an injunction, the facts of the bill must be taken as true, and they are quite sufficient to entitle the complainant to it. If he proceeds with his cause, however, he must take out administration on the estate of his deceased wife.

Judgment reversed.

THE STATE, *ex rel.* JOHN M. TUCKER, plaintiff in error, vs.
LAVINIA, a person of color, defendant in error.

THE STATE on the relation of JOHN M. TUCKER, plaintiff in
error, vs. WILKES, a male slave, defendant in error.

[1.] A *certiorari* does not lie at the instance of the State to the Superior Courts, to obtain a rehearing in the Inferior Courts, against a slave, who has been acquitted for an alleged violation of the Acts of 1818, *Cobb* 992, or of 1835, *Cobb* 1006.

[2.] A writ of error does not lie to this Court, in a criminal case at the instance of the State.

Certiorari, from Baldwin county. Decided by Judge HARDEMAN, February Term, 1858.

The bills of exception in these two cases were filed under the following circumstances :

A warrant returnable to the Inferior Court was issued against a negro woman Lavinia, on the information of John M. Tucker, for residing in the State of Georgia without her name being inserted in the book of registry of free persons of color kept by the Clerk of the Inferior Court; enjoying the profit of her labor and not being in the employment of a master or owner, contrary to the 5th and 6th sections of the Act of 18th December, 1818, entitled "An Act supplementary to and more effectually to enforce an Act entitled 'an Act, prescribing the mode of manumitting slaves in this State.'"

Upon the hearing, the prosecutor introduced as a witness, *Tomlinson Hart*, who swore that the said Lavinia lived in a house not belonging to him, nor provided for her by him; that the said Lavinia belonged to him, but did not work for him, nor had she done so for ten or fifteen years, nor did she work for any white person by virtue of any contract for his benefit; witness gave her papers.

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The case being closed and argued, the prosecutor asked the Court to let the witness explain how the slave came to pass away from his premises and live alone as a housekeeper, but the Court refused.

Prosecutor then moved the Court to declare the said Lavinia forfeited. The Court refused the motion and decided that the said Lavinia was the slave of Tomlinson Hart, and liable to his debts. From this decision the prosecutor appealed by *certiorari* to the Superior Court.

After argument, the Court dismissed the *certiorari*, on the ground, that the proceeding being criminal, and the defendant Lavinia having been acquitted by the Inferior Court, the Superior Court had no constitutional power to order a rehearing.

A warrant was also issued against Wilkes a male slave, on the information of John M. Tucker, for returning to the State of Georgia from the State of New York, a non-slaveholding State, since the passing, and in contravention of the 5th section of the statute 26th December, 1835, entitled "An Act to amend the several laws now in force, in relation to slaves and free persons of color."

Upon the hearing, the prosecutor proved by *Tomlinson Hart* that the slave Wilkes, the prisoner was in the States of New York, New Jersey, and Pennsylvania in 1853, and moved the Court to adjudge him forfeited according to the 5th section of the Act of 1835.

The Court decided against the motion and dismissed the warrant on the ground, that the Act of 1835, did not apply criminally to the case as claimed by the prosecutor.

From this decision the prosecutor appealed by *certiorari* to the Superior Court.

After argument, the Court below dismissed the *certiorari* on the ground "that as the original proceedings in the Court below, viz: the Inferior Court of Baldwin county, was of a criminal nature, and the Inferior Court had decided in favor

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of the defendant therein, that therefore the Superior Court had no constitutional power to order a rehearing."

To these decisions of the Court the informer John M. Tucker filed his bill of exceptions, assigning the same as error.

McKINLEY, for the plaintiff in error.

KENAN & HARRIS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The woman *Lavinia* was informed against for violating the 6th section of the Act of 1818, *Cobb* 992, for working at large and enjoying the profits of her labor, not being in the employment of any master or owner, or of any white person, by virtue of any contract with a master or owner, securing to such master or owner the profits arising from the labor of said slave, being a woman of color.

Wilkes was prosecuted for violating the 5th section of the Act of 1835, *Cobb* 1008, which prohibits a male slave from returning to this State, after having been in a non-slaveholding State. The accused were duly arrested and brought before the Justices of the Inferior Court of Baldwin county, or a majority of them, and severally put upon their trial; and after hearing the evidence were acquitted and discharged by the Court.

[1] Both cases were brought before the Superior Court by *certiorari*, and Judge Hardeman dismissed the *certiorari* on the ground, that the defendants having been acquitted by the proper tribunal, constituted by law for their trial, he had no constitutional power to order a rehearing. To reverse this decision, these writs of error are prosecuted. We are of the opinion that no error was committed by the Circuit Judge, Independent of the Act of 1803, which negatives the idea, that slaves can be twice tried for the same offence, *Clayton's*

Digest page 133, we see no reason why this great principle of the common law should not be applicable to slaves and free persons of color, as well as to white persons. Indeed counsel concede that slaves are protected by this humane principle, as to all prosecutions which subject them to corporal punishment. But he insists, that the great policy of the State as manifested in her anti-manumission laws forbids that the doctrine should be extended to cases like these. While we concur with our brother MCKINLEY, that our policy is not to favor the freedom of the slave, real or colorable, still the State has passed no statute, making the discrimination contended for. On the contrary, there is abundant evidence upon the statute book, that she has guarded with a magnanimity worthy of her power and greatness, the liberty of persons of color claiming to be free.

In the opinion of this Court, there is nothing either in the 7th section of the 3d article of the Constitution of the State, *Cobb 1123*, giving to the Judges the right to use all writs necessary to carry their powers fully into effect; nor in the 10th section of the Act of 1818, *Cobb 994*, making it the duty of all Courts and Judges, before whom any proceeding may be had, under that Act, so to construe the several provisions thereof, as to carry the same into complete operation, according to the true spirit, intent and meaning thereof, as declared in the preamble, which will justify the interposition of the Superior Court in these cases.

The Act of 1829, not referred to by counsel, *Cobb 1020*, is evidence that the Superior Courts did not claim to exercise the power of controlling the Inferior Judicatories, as to the trial of slaves. It is expressly conferred by that Act in *certain cases*, namely, the trial of slaves and free persons of color, under the Acts of December 1811 and 1816; and of any Acts amendatory thereof. The prosecutions in the two cases before us, were not under either of those Acts or any other amendatory thereof, but for violations of the Acts of

1818 and 1835. The inclusion of the one class of cases, is the exclusion of all others.

It is worthy of notice, that notwithstanding the *words* of the Act of 1839, gives to "either party the right to *certiorari* any proceeding originating under the acts therein specified, it is not believed that the *State* has ever claimed to exercise the right; that is to obtain a second trial when a slave has been acquitted, and we apprehend it would hardly be tolerated, especially if the discharge was upon the merits. The words either party have probably been construed to be equivalent to any *party*, that is, any party *defendant*. In the face of this statute, it is not denied that an acquittal from the offences designated in the Acts of 1811 and 1816, and the Acts amendatory thereof, is final.

But we repeat, it is needless to dwell upon this Act. The cases under consideration do not come within its provision.

[2.] But there is another principle involved in this discussion which has been entirely overlooked. Suppose Judge HARDMAN was wrong, can his errors be brought up by the *State*, before this Court for revision? This question was solemnly argued and decided by this Court in the *State vs. Jones*, 7 Ga. Rep. 422, in which was held, that a writ of error does not lie to this Court, in a criminal case, at the instance of the State. We adhere to that position. We believe it to be a sound exposition of the Act of 1845, creating this Court, Counsel for the State approve of that determination. It might be conceded then, that the Circuit Court had the right to correct the alleged error committed by the Inferior Court in acquitting these prisoners; still it may be assumed that this Court can take no cognizance of the judgment of the Superior Court.

One word as to the Act of 1835. Does it not need amendment? Does not a slave who is carried by his owner to a non-slaveholding State and voluntarily returns, give the highest evidence of his fidelity to the South? Besides, by examining the language of that Act, it is directly repugnant to the

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fugitive slave law of 1850. The owner subjects himself to a penalty for bringing back his runaway from the free States. A slave who has escaped and is brought back *in invitum*, is likely to be a more dangerous person than one who comes back of his own accord.

Judgment affirmed.

DAVID S. JOHNSTON, plaintiff in error, vs. ROBERT CRAWLEY,
defendant in error.

- [1.] Certain persons associated and drew up a declaration and recorded it, agreeably to the act of 1847, authorising persons to prosecute the business of manufacturing with corporate powers and privileges, and assumed the name of the Madison Steam Mill Company. On the 11th of February 1854, the Legislature passed an act granting corporate powers and privileges to the Madison Steam Mill Company, recognizing it as a body corporate and politic, declaring among other things that it should have, possess and enjoy all the *franchises* which were then held by the said company. Held that these two acts so far as they are consistent with each other make the charter of the company.
- [2.] The acceptance of the new act did not destroy the old organisation.
- [3.] If an agent of a corporation have authority to convey a mortgage, and affixes thereto anything which the law recognizes as a seal when affixed by a natural person, it will be a good execution presumptively by the corporation.
- [4.] The purchaser at Sheriff's sale, of property subject to a mortgage with notice of the mortgage, cannot occupy a more favorable position in relation to the property than the mortgagor.

Claim. In Morgan Superior Court. Tried before Judge HARDEMAN, at March Term, 1858.

This was a claim interposed by David S. Johnston to the Madison Steam Mill and the machinery thereto appertaining, which had been levied upon by the Sheriff under a mortgage *a. fa.*, issued at the suit of Robert Crawley against the Madi-

son Steam Mill Company. Johnston claimed the property under and by virtue of a sale thereof, made sometime before by the Sheriff, under general judgments and executions against said Company of junior date to Crawley's mortgage.

Crawley's mortgage was dated 25th April, 1855, and judgment of foreclosure 6th March, 1856, *fi. fa.* issued 15th March, 1856.

Upon the trial the plaintiff in execution, Crawley, offered in evidence the mortgage *fi. fa.* and entries thereon; proved that Dr. Elijah Jones acted as President and Albert G. Foster as Secretary of the Madison Steam Mill Company, from December 1854, till it stopped running; that when the Sheriff sold the Mills under the general judgments against the Company, in March 1856, public notice was given that there were several mortgages upon the property of older dates than the judgments; amongst which was the mortgage of Crawley, which had been foreclosed, and that the others were in progress of foreclosure. The property was bought by David S. Johnston the claimant, for \$126. The Company ceased to run the factory in March, 1855.

Plaintiff further proved, that when the same property was subsequently levied upon under his mortgage *fi. fa.* and offered for sale by the Sheriff, that claimant was present, read a paper to the persons then assembled, and afterwards bid for the property, but before it was knocked down, stopped bidding and made known his claim and interposed the same. The amount due on the mortgages, all of which were of older date than the general judgments, was about eighteen or twenty thousand dollars.

1. Claimant offered in evidence the executions, issued on the general judgments, and levied upon the property in dispute, and under which it was sold when he became the purchaser.

2. The deeds of the Sheriff to claimant for the property in controversy.

3. The mortgage to Crawley, under foreclosure of which the *fi. fa.* now levied, issued. This mortgage had a scroll

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(L. S.) opposite the names of E. E. Jones, President, and A. G. Foster Secretary, subscribed to said mortgage, and purporting to be executed by said Company, per said President and Secretary, but no impression of a corporate seal, nor anything purporting to be a seal, except the scrolls above mentioned.

4. Claimant then put in evidence the book of minutes of said Company.

Claimant having closed his testimony, the plaintiff in execution offered as rebutting evidence, the recorded declaration from the records of the Superior Court of Morgan county, of certain persons whose names are thereunto signed, of their having associated themselves as a company, for the purpose of manufacturing into yarn and cloth, the staples of cotton and wool, under the corporate name of "The Madison Steam Mill Company," agreeably to an act of the General Assembly of the State of Georgia, approved 22d December, 1847, entitled "an act to authorize all the free white citizens of the State of Georgia, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges." Also, the recorded affidavit of Elijah E. Jones, styling himself President of said company, setting forth the amount of capital stock actually paid in, agreeably to a requirement of the act herein before last mentioned; which evidence was objected to by claimant's counsel, as incompetent in this case, there being already evidence before the Court, showing that subsequently to the recording of said declaration and affidavit, and before the execution of the mortgage upon foreclosure of which plaintiff's execution had been issued; the persons who in their corporate character are defendant in execution, had adopted a different charter, herein before mentioned as set forth in the act approved on the eleventh day of February, A. D. 1854, and thereunder had commenced a new and different corporate existence, which objection was overruled by the Court and the evidence admitted: to which ruling claimant's counsel excepted and do now except.

After the testimony was closed and in the further progress of said cause, when the Court was proceeding to charge the jury, counsel for claimant, requested the Court to charge the jury, (such request and others hereinafter mentioned, being then and there submitted in writing):

1. "That authority to execute a deed, or conveyance of real estate, under seal, must be by instrument under seal: And that this principle of law applies as well to corporations as to natural persons. If therefore the jury find that the appointment of Messrs. Jones and Foster, by the corporation, to execute this mortgage was not by deed, then they had no authority to act, and the mortgage is void."

Which charge the Court refused to give, and to this refusal counsel for claimant excepted, and do now except:

2. And further, counsel for claimant requested the Court to charge the jury; "that if the appointment of Messrs. Jones and Foster, by vote of the stockholders (should the jury find the appointment to have been so made,) had been sufficient without a deed, (or without being under seal,) still the law requires that to bind a corporation by deed, the instrument must be under the corporate seal. That seal need not be a regular permanent seal of the corporation. It may be a seal adopted for the time, or purpose; it may even be the seal of a private person adopted for the time or purpose; but if it be a private seal adopted, such adoption must appear in such a case as that at bar, by the vote of those who have authority to adopt a common seal for the corporation."

Which charge the Court refused to give and to this refusal counsel for claimant excepted, and do now except.

3. And further, claimant's counsel requested the Court to charge the jury; "that if no such vote appear to have been made in this case, and if the mortgage has not appended to it a seal so adopted by the corporation, it is void."

Which charge the Court refused to give, and to this refusal claimant's counsel excepted and do now except.

4. And further, claimant's counsel requested the Court to

charge the jury; "that a corporation can have but one seal, and therefore the seals of both Elijah E. Jones and Albert G. Foster could not have been the seals of the corporation."

Which charge the Court gave to the jury, but added thereto; that under all the circumstances of this case the corporation having held Jones out to the world as President, and Foster as Secretary thereof; and the stockholders having by vote or resolution, authorized the President and Secretary to execute a mortgage to the plaintiff, the Court held the private seal of Elijah E. Jones, affixed to his name with the official designation of President, to be a sufficient sealing by the corporation, and that the mortgage executed as it was, is valid and binding to all intents and purposes.

To which addition to the charge thus requested, complainant's counsel excepted, and do now except:

5. And further, the Court was requested to charge the jury; "That if Messrs. Jones and Foster had been legally appointed agents to execute this mortgage, they should have executed it in the name of their principal, and in order to do this, should have signed the name of their principal accompanied by the seal adopted by the principal, and not have signed their own names alone with their private seals, and if the jury find that they have not thus appended to the mortgage the name and seal of their principal but their own, the mortgage is void."

Which charge the Court refused to give, and the claimant's counsel excepted, and do now except to such refusal.

6. And further, the Court was requested to charge the jury; "that this deed, executed as it is, when its terms are considered and construed by the Court, is found not to be executed in the name and with the seal of the corporation, for the seals of the President and Secretary cannot be the seal of the corporation."

Which charge the Court refused to give, and the claimant's counsel excepted, and do now except to such refusal.

7. And further, the Court was requested to charge the jury;

“that the corporation, the defendant in this case, derives its existence from the act of our Legislature, (or charter) approved February 11th, 1854; and in such a corporation, by the law of the land, the administrative capacity, or capacity to execute deeds or mortgages, belongs to the officers of the corporation, that is to say, in this case, to the Directors, President and Secretary.

Which charge the Court refused to give, and to that refusal the claimant's counsel excepted and do now except.

8. And further, the Court was requested to charge the jury; “that until such officers (the Directors, President and Secretary) were elected, although the charter had been accepted by the stockholders, the corporation lacked such organization as would enable it to do any such act as the execution of a deed.”

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

9. And further, the Court was requested to charge the jury; “that if these last two propositions be not true generally, still, in this case, the capacity or power to do the administrative act of executing this mortgage belonged alone to the President and Secretary of the corporation, if the jury shall find, from the evidence, that the stockholders had instructed the President and Secretary to do it.”

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

10. And further, the Court was requested to charge the jury; “that if then they should find (from the evidence) that there had been no election of President and Secretary after the acceptance of this charter, and before the execution of this mortgage, then the deed was not executed by the President and Secretary of the corporation. In such event, Elijah E. Jones and Albert G. Foster had no authority to execute this mortgage; and the same is void as against the rights of the judgment creditors, under whose executions this property was sold, when it was purchased by the claimant.”

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Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

11. And further, the Court was requested to charge the jury; "that if for either of the above reasons, or for all, this mortgage is found to be void as against all or either of the judgments under which said property was sold by the Sheriff, and purchased by the claimant, then, in the language of the Supreme Court, 'The relation, in this respect, which the claimant bore to that judgment, was the same which the plaintiffs, in the general judgments, had borne to that judgment,' and and the interest which he had in the property 'was the interest which he acquired by purchasing it when sold under their judgments. What those plaintiffs had the right to sell, then, under their judgments, was what he purchased,' and he must recover as against the plaintiff in execution."

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

12. And further, the Court was requested to charge the jury; "that the ratification of an imperfect and invalid deed must itself be by deed."

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

13. And further, the Court was requested to charge the jury; "that neither the ratification and adoption of an act or instrument, originally defective; nor, (in this case) the subsequent adoption of the President's private seal as the seal of the corporation, can affect the rights of third persons, acquired before such ratification and adoption."

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

14. And further, the Court was requested to charge the jury; "that if they should find that the mortgagors and their former associates, had not published, once a week for two months, in the two nearest Gazettes, their declaration of association under an Act of the General Assembly of this State, entitled 'An Act to authorize all the free white citizens of the

State of Georgia, and such others as they may associate with them, to prosecute the business of manufacturing with corporate powers and privileges,' approved December 22d, 1847; and had not published in the two nearest Gazettes, once a week for one month, the oath or affirmation of the President of said corporation, of the amount of the capital actually paid in and employed by said corporation, they acquired no corporate rights under that proceeding."

Which charge the Court refused to give, adding that the law would presume compliance with these requirements; and to that refusal and charge, claimant's counsel excepted and do now except.

15. And further, the Court was requested to charge the jury; "that if said mortgagors and their former associates did acquire any corporate rights by their proceedings under the act of 1847, (before mentioned) and were in law, under the same, duly incorporated, that incorporation ceased when they adopted the statutory charter, under the Act of the General Assembly, entitled 'An Act to grant corporate powers and privileges to the Madison Steam Mill Company.'"

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

16. And further, the Court was requested to charge the jury; "that the mortgagors although entitled to all such franchises as they acquired under the Act of 1847, (aforesaid) and their proceedings under it, not inconsistent with the said statutory charter, nevertheless upon the acceptance of that statutory charter, commenced a new corporate existence, and were bound, before they could exercise the granted corporate rights, to organize under that charter, by the election of a Board of Directors and through them of a President and Secretary."

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do now except.

17. And further, the Court was requested to charge the jury; "that the charter of the Madison Steam Mill Compa-

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ny, having fixed and limited the character of the securities to be given by them for loans and debts, to-wit: 'bonds or promissory notes'; the Company was not capable of giving a security by mortgage."

Which charge the Court refused to give, and to that refusal claimant's counsel excepted and do dow except.

The jury found the property levied on subject to the execution; whereupon the claimant excepted.

CUMMING; REESE; STARNES; and JENKINS, for plaintiff in error.

CONE, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The points presented in this record may be resolved into the following: Was there an existing corporation, duly organized with power to act at the time of the execution of the alleged mortgage? If there was such a corporation, was the instrument properly and legally executed either by the corporation itself or its legally constituted agents, in a manner to bind the corporation? If it was not so executed, can the corporation or the claimant, under the facts of the case, take advantage of the defect, and defeat the rights of the mortgagee?

[1.] The Madison Steam Mill Company owed its corporate existence, originally, to a declaration drawn up by certain persons as stockholders under the Act of 1847, authorizing persons to prosecute the business of manufacturing with corporate powers and privileges. It assumed the corporate name of "The Madison Steam Mill Company." On the 11th day of February, 1854, the Legislature passed an Act to grant corporate powers and privileges to the Madison Steam Mill Company. That Act treats the Company as an existing corporation. The first section enacts that the persons therein named, and their associates, should be known, distinguished

and *recognized* as a body corporate and politic. It not only vests the Company with the property, real and personal, which they then held; but declared also that they should have, possess and enjoy *all the franchises* which were then held by the said Company.

Here is a recognition of the Company as a *corporate body*, and a confirmation to it of all the *franchises* which it then held. There is no repealing clause to the Act. It is an amending and confirmatory Act. The name of the Company is not changed, and many of its most important powers are to be looked for in the Act under which it derived its original corporate existence. The old charter is not annulled, except so far as there is an irreconcilable repugnancy between that and the later Act as accepted by the Company. Every Act legally done under the old charter, is as valid and binding as it would have been had the Act of 11th February, 1854, never been passed. That Act infringes no rights which the Company or the public acquired under the Act of 1847.

These two Acts, so far as they are consistent with each other, make the charter of the Madison Steam Mill Company. To the two Acts we must look for the faculties, powers and privileges of the Company. When the stockholders met on the 1st of May, 1854, to accept the charter of the 11th of February before, they met as the stockholders of the Madison Steam Mill Company.

[2.] The adoption of the charter of 18th February did not destroy the organization under the old Act. There is nothing in the last Act incompatible with the continuance of that organization until there was an election agreeably to the directions of the Act. The Act of 1854 does not declare when the first annual meeting of the stockholders for the election of directors, should be held. The stockholders met on the 3d of March, 1855, and authorized the President and Secretary to execute mortgages to secure debts due to persons for borrowed money, and for cotton purchased on a credit. The mortgage was executed on the 25th April, 1855. For the

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reasons assigned, we think that at the date of this mortgage, the Madison Steam Mill Company was an existing corporation, with an organization and capacity to act.

Was the mortgage legally executed, so as to bind the corporation?

[3.] The mortgage is drawn with the manifest purpose that the name of the corporation should be signed thereto, and the corporate seal affixed.

It is signed by the President and the Secretary, with their own names, (signed officially,) with a scroll to each name for a seal. In England the property of a corporation can be conveyed away under the common seal only. Natural persons must convey lands there, under seal, and the seal must be impressed on wax, a wafer or other impressible substance. This rule, in many of the States of this Union, has been much relaxed, and a scroll has, by Legislative enactment or judicial decision, been held to be sufficient. Our own Legislature has, in very strong language, declared that the annexation of a scroll instead of a seal on wax, wafer or other tenacious substance, shall be a sufficient execution of a sealed instrument. *Cobb* 274. If it shall be sufficient in the case of a natural, why not in the case of an artificial person? The statute makes no distinction. If it be proved to be the seal, that is sufficient. But the name of the corporation is not signed; that of the President and Secretary only. A corporation executes conveyances under its corporate seal. But an artificial person cannot, like a natural person, write its name. Its corporate name being subscribed would not give the instrument greater validity. Messrs. Angel and Ames say that they "see no reason, unless the Act of incorporation expressly provides what the common seal shall be, why the substitute allowed for the private seal of an individual should not also be allowed for the seal of a corporation." They know of no decision upon the subject. *Ang. and A. on Cor. Sec.* 218. "A corporation as well as an individual person, may use and adopt any seal. They need not say that it is

their common seal." *Mill Dam Foundry vs. Hovey* 21. *Pick Rep.* 428. If they adopt a seal different from their corporate seal for a special occasion, or if they have no corporate seal, the seal adopted is the corporate seal for the time and the occasion. If a corporate body choose to adopt a scroll as their common seal, why may it not do it? It cannot, at common law, because a scroll cannot, by that law, be a seal. But a scroll is made a seal by statute in this State, and there is no reason why it may not be adopted by a corporation here, either as a common seal, or as a seal for a special purpose. The same kind of proof which would establish, if disputed, the authenticity of the genuine common seal in a particular instance, would equally establish the authenticity of a scroll as the corporate seal; to-wit, that it was affixed by authenticity, express or implied, of the corporation. The vote of a competent board of directors that the corporate or other seal was directed to be used, is not necessary. It may be proved otherwise. If an agent of a corporation have authority to convey or mortgage its property, and he execute the conveyance or mortgage, and affix thereto anything that the law recognizes as a seal, when affixed by a natural person, it will be a good execution presumptively, by the corporation. *A. and A. on Cor. Sec.* 226. In England, when an Act of Parliament empowers the directors of a company to enter into contracts, the contracts need not be under seal. *Grant on Corp.* 67. In this case, however, the mortgage is under seal, and under the favor of its execution, to render it valid, it must be held to be the seal of the corporation.

If the seal was put there by the agents of the company, legally constituted for that purpose, then it is the seal of the corporation, and the mortgage is valid and binding.

The agent of a corporation aggregate, to bind the principal by deed, need not be appointed by deed. It is sufficient if he be appointed by vote. *A. and A. on Corp. Sec.* 224. The agents by whom the mortgage before us was executed, were appointed by a meeting of the stockholders. If they

had power or authority to make the appointment, there can be no question of its validity. As a general rule, when a corporation is created by statute, or, in England, derives its charter from the Crown, and the statute or charter prescribes the mode in which contracts shall be made, that mode must be pursued. I say, this is the general rule. If the Act or charter be silent, then the rule of the common law prevails. "It was incident, at common law, to every corporation, to have a capacity to purchase and alien lands and chattels, unless they were specially restrained by their charters or by statute. Independent of positive law, all corporations have the absolute *jus dispenendi*, neither limited as to objects nor circumscribed as to quantity." 2 *Kent* 281. This corporation, under its original organization, was restricted in the quantity of real and personal property which it might own, to such as was necessary for the purposes of its incorporation, or such as it might be obliged to take in the settlement of debts due to it, and it was vested with power to dispose of it. Its mode of action was not prescribed. There was to be a President, but how and in what manner it might alien or dispose of its property is not prescribed; nor is the mode of alienation prescribed in the Act of 1854. Prior to the organization under that Act, the stockholders directed mortgages to be executed to secure debts for borrowed money and cotton purchased on a credit. There is nothing restrictive of this power in the statutes. The direction in the 3d section of the Act of 11th February, 1854, to the stockholders to elect, at an annual meeting, seven directors to manage and control the affairs of the Company, does not restrict this power. This general power of management and control confers no authority to borrow money for the use of the Company, much less to mortgage and sell its property. By the 6th section of the Act, the stockholders of the Company might, by a vote of two-thirds, authorize the directors to borrow money. This positive regulation forbids the inference that the directors had that or any analogous power un-

der the third section. If they had no such power, there was no restriction of the common law power to dispose of the property through any other instrumentality; and the President and Secretary were the chosen agents for that purpose.

The resolution of the stockholders was, therefore, a competent authority to them to do the act. It follows, therefore, that as Jones and Foster, President and Secretary, were the legally constituted agents of the Company to make the mortgage, the seal affixed by them is presumptively the seal of the Company, and that the Company is bound by it.

[4.] We might stop here; but it seems proper to us, to say a few words in regard to another view of this case.

At the sale of the property at which the plaintiff in error became the purchaser, notice was given publicly, that it was sold subject to certain mortgages amounting to about \$20,000. The property was worth about twenty thousand dollars. The mortgage under which this case comes up, was stated to have been foreclosed, and the others were in process of foreclosure. The judgments under which plaintiff in error became the purchaser, were of prior date to the mortgages. He purchased the entire property for the sum of one hundred and twenty-six dollars. There is no pretence that the debts secured by the mortgages were not *bona fide* debts due by the Company to the several creditors who held them. The Madison Steam Mill Company intended to secure the debts by mortgages. The instruments were intended as mortgages: the plaintiff in error, at the time of his purchase, had not only the notice which the law implied from their having been recorded, but he had actual notice of their existence, and that if he purchased, he would purchase subject to them. He purchased the equity of redemption only, and the amount of these mortgages is the balance of the consideration which, by his agreement, he is bound to pay if he retains the property. The mortgage creditors, under our system of foreclosure, have a legal judgment which they have a right to enforce against the mortgaged property. If there

was a power, and that power had been defectively executed, as is insisted, equity, under the evidence in this case, would aid the creditor against the purchaser, in either executing it, or correcting it so as to give it legal effect and operation from its date.

Now that it is in a condition to be enforced at law, it would not interfere in behalf of such a purchaser to resist the plain demands of justice, and that according to his own agreement.

The claimant could not present a case in equity that a Chancellor would listen to for a moment.

He would be obliged to allege, if he stated his case fully and truly, that he had purchased property worth \$20,000 for the sum of \$126; that at the time of the purchase he had notice of mortgages, to which the property was subject, to an amount equal to the value of the property, some of which had been foreclosed, and others were then in process of foreclosure; that he purchased the property subject to them, but that he had discovered the mortgages had not been so executed as to create a lien on the property, and he prayed the Court to protect his legal title. His cause would not be entertained for a moment by a Court of Chancery. It would not aid him to escape from the consequences of his own agreement fairly and openly made, with no circumstance of fraud, imposition or hardship against him, to commend him to its favor. The disparity between the value of the property and the consideration paid for it, would alone prevent a Court of Equity from giving aid to the purchaser.

According to the view we have taken of this case, the mortgagors could not have resisted the foreclosure of the mortgages, and the plaintiff in error cannot occupy a more favorable relation to the case. He purchased the property subject to them, and if he wishes to retain it, he must pay the mortgages.

Judgment affirmed.

JAMES A. WADE, executor, &c., plaintiff in error, vs. **DAVID S. JOHNSTON**, defendant in error.

As a general rule, when an article can be removed without essential injury to the freehold, or the article itself, it is a chattel, and not a fixture. This criterion, as to what is or is not a fixture, is subject to qualification, and may be controlled by the agreement of the parties, or established custom and usage.

Claim, from Morgan county. Decided by Judge HARDMAN, March Term, 1858.

The defendant in error in this case filed his claim, alleging that he was the owner of certain machinery and property appertaining to the "Madison Steam Mill," which had been levied on by virtue of a mortgage *fi. fa.* from the Inferior Court of Morgan county, in favor of James A. Wade, as executor of Hudson Wade, deceased.

When the case came on for trial, the plaintiff in execution having given in evidence his execution, under which the levy was made, the mortgage and judgment of foreclosure, upon which the said execution issued, introduced as a witness,

Leroy M. Wilson, who testified, that he was in the employ of the Madison Steam Mill Company, for some time previous to, and on the 25th of April, 1855. The Madison Steam Mill Company was then in possession of the property claimed, and had been in possession of the same for some time previous to that time; was present at the sale of the property in March, 1856, when claimant purchased the property. Previous to the sale, notice was given that the property was sold subject to various mortgages, the whole amounting to near \$20,000; the names of the mortgagees were stated, and the amount of each mortgage; the plaintiff's mortgage was one of them; the claimant bid off the property at \$126, subject to the mortgages; the property was not produced at the sale, nor was the machinery sold by itself, but the whole of the property, including the factory building, land, and all the machinery in the building, was sold in a lump.

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With reference to the machinery, the witness stated, that the spinning frames all stood on the floor by their own weight and were not fastened at all; the cards stand in the same way; the two drawing frames were held by small screws, through an opening in the foot of the frames; the speeders, and also the wool cards, stood upon the floor, and were not fastened at all; the iron railing of the wool mule was fastened to the floor by screws; the balance of the mule was not attached at all, but stood by its own weight; the part that ran on the railing was moveable, and not attached to the building; the willower and pickers were not attached to the building at all; the looms were attached to the floor by screws, through an opening in the foot of the loom; the frame of the dressers was fastened to the floor, through a hole in the foot, by screws; the horizontal shafting was held by iron hangings; the hangings were held by bolts and screws to the joists; all the rest of the machinery, such as reels, ball winders, beaming machines, &c., stood on the floor, and were not fastened to the building in any way. When the machinery was in motion, leather bands connected the machinery with the shafting; when the machinery was not in motion, the bands were actually taken off; all the before mentioned machinery could be removed from the building without injury to the machinery or to the building; it was a common thing in this country to sell the machinery separate from the building, and to remove it from one building to another; the boilers were in a room adjacent to, but joined to the main building, and could not be removed without removing, to some extent, the masonry that surrounded them; the engine rested on a bed of granite, the bottom of the engine being about even with the top of the floor; the pipes which supplied the steam, were up near the ceiling, in the engine room; the pipes which supplied the engine with water from the well, ran under the floor, and were reached by removing some of the planks left loose for that purpose; the boilers, pipes and engines could all be removed without

injuring them or the building; the upright shaft was connected with the engine, and moved by bevel wheels; the horizontal shafting was connected with the upright shafting by bevel wheels; it was capable of being taken to pieces and removed without injury to the building; the corn mills were placed on a platform built on the floor, and driven by a band from the main shaft; they were braced to keep them steady, but could be removed without injury to themselves or to the building.

The claimant introduced as a witness, *J. Smith*, who testified, that the bottom of the engine was bolted down to the bed of granite, upon which it rested, with four iron bolts; that the engine, upright shafting, bevel wheels and balance wheel, weighed about twelve tons, and stated, that under the term of steam mill, in his (witness') opinion, was included the engine, the boilers, and shafting, and building; that when the whole machinery was in motion, the whole was connected together by bands; that he should say the term "The Madison Steam Mill" included the building, the boilers and engine, upright and cross shafting, together with all the machinery connected therewith, necessary to carry on the business of manufacturing.

The claimant gave in evidence, his deed from the Sheriff, executed after the purchase by him in 1856; and also the common law *fi. fas.* recited in said deed, and under which the sale was made.

Claimant insisted that all the before mentioned machinery were fixtures and real estate, and that the mortgage of the plaintiff in error having been foreclosed before a Justice of the Inferior Court, that judgment of foreclosure and the execution under it were void, as a mortgage of real estate could only be foreclosed in the Superior Court.

The plaintiff in error insisted that the machinery in question was personal property, and that therefore his mortgage was rightfully foreclosed by a Justice of the Inferior Court, and requested the Court so to charge the jury

This charge the Court refused to give, but on the contrary, charged the jury, "that the whole of the property aforesaid was real estate, and that as said mortgage had been foreclosed before a Justice of the Inferior Court, the judgment of foreclosure and the execution issued thereon were void, said foreclosure not being had or made by any Court having jurisdiction of the same.

The jury returned a verdict in favor of the claimant, and the plaintiff in error filed his bill of exceptions, saying that the Court erred,

1st. In deciding that all the property aforesaid was real estate.

2d. In deciding that said judgment of foreclosure, and the execution issuing upon the same, were void.

3d. In deciding that said mortgage, as to the property aforesaid, could not be foreclosed before a Justice of the Inferior Court.

CONE, for plaintiff in error.

REESE, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The Madison Steam Mill Company mortgaged to the plaintiff in error, certain real estate, on which their factory was situated, and also included in the same mortgage, as personal property, various articles of machinery then in the building. The plaintiff in error foreclosed his mortgage upon the machinery, as personal property, before one of the Justices of the Inferior Court of Morgan county, and execution was issued upon said judgment of foreclosure, returnable to the Inferior Court of Morgan county. This execution was levied upon the machinery, and defendant in error interposed a claim to the same.

When the case came on for trial in the Superior Court, that Court decided that all the machinery, and every other species of property, embraced in the mortgage, was real es-

tate; and that as a mortgage upon real estate could only be foreclosed in the Superior Court, the judgment of foreclosure, and the execution issuing thereon, was void.

Upon these facts and the evidence set forth in the bill of exceptions, counsel for plaintiff in error insists, that the machinery and other property, mentioned in the mortgage as personal property, is personal property, and not fixtures and real estate, and this is the sole question in the case.

A previous adjudication of this Court, during the present Term, renders the discussion of the point made in this bill of exceptions entirely nugatory. It is not disputed but that the mortgage in this case covers all the personal property, as well as the real estate, the factory building, engine, boilers, shafts and machinery; and the Court having sustained the validity of the mortgage, the question as to which Court is entitled to foreclose, becomes one of utter immateriality, so far as David S. Johnston, the claimant, is concerned. It may well be doubted, whether he had the right to contest the form of foreclosure. If the mortgagee is content, what is it to him whether the mortgage was foreclosed in one Court or the other? He swore that the property belonged to him, under and by virtue of his purchase at Sheriff's sale, and that was the issue he tendered. And I would respectfully submit, that in all cases of claim, the law should be so amended as to restrict the investigation to the claimant's title, if such be not the proper construction of the law as it stands. What right have third persons to intervene between creditor and debtor, provided the paramount title to the property be not in him? Such is the construction of the Alabama Courts upon a statute precisely similar to our own.

But waiving all this, inasmuch as the doctrine has been ably and thoroughly argued on both sides, as to what constitutes fixtures, the Court will declare its opinion upon the subject, not as between landlord and tenant, executor and heir, executor of the tenant for life and remainder-men; not as to agricultural property, but as applicable to mills and

Wade, ex'or, vs. Johnston.

manufactories. And the rule of the common law, as we understand and adopt it, may be summed up in a single sentence, and it is this: wherever the article can be removed without essential injury to the freehold, or the article itself, it is a chattel; otherwise, it is a fixture. This rule is recommended by its simplicity and definiteness. Depart from it, and we are at sea, without chart or compass. This rule, of course, may be controlled by the agreement of the parties, as well as by established usage or custom. And most of the exceptional cases to the foregoing rule, and which seem to conflict with it, will be found to arrange themselves under one of these heads.

Having no statute law upon the subject, an eloquent appeal has been addressed to this Court, to apply the common law, with enlightened and discriminating reason, to adapt it to the ever varying necessities and requirements of advancing civilization; that the wonderful developments made in manufactures at this day, demand such judicial construction; that the common law is confessedly undergoing modifications, and that the tendency in this country, is to consider the land itself set apart for manufacturing purposes, the buildings erected on it to receive and contain the machinery, the boilers and engine used to generate steam, as a motive power, and the machinery itself, the important and efficient agent in the process, as constituting one great whole, and taking the distinctive character of the land upon which it rests; that this falls within and encourages the spirit of the age, and the development of this great branch of industry; and that Georgia should not lag behind in the race.

It is conceded that there are decisions which seem to favor these views. The weight of modern authority, however, is the other way; and the common law rule is adhered to and enforced in reference to this species of property, in some of the principal manufacturing States of the Union. *Amos & Ferardon Fix's*. 3, 4, 5, 6, 7, 56, 58, 184 *et passim*; 14 *Mass. R.* 352; 17 *Johns.* 116; 20 *Wendell*, 636; 24 *Wendell*, 191;

10 *Barbour*, 157; 9 *Connecticut*, 63; 9 *East*, 215; 5 *Denio*, 337; 11 *Vermont*, 433; 3 *Blackford*, 111; 7 *ditto*, 462.

Had the later cases concurred in modifying the common law rule in the direction and to the extent contended for by the learned counsel for the defendant in error, this Court might be inclined to lend its ear more willingly to the appeal which has been made. But seeing that New York, Connecticut, and other Northern States, which have the largest amount of machinery in operation, have not been persuaded as to the wisdom of changing the common law rule, we may well pause before taking the step; and conclude, as we do, that the interference invoked would proceed better from the Legislature, which, in abolishing one rule, might substitute another equally certain and accurate.

Judgment reversed.

JAMES B. EDWARDS, plaintiff in error, vs. NEILL McKINNON,
defendant in error.

A witness is competent to testify, who has no certain interest in the event of the suit, and where the judgment in the case cannot be given in evidence, either for or against him, in a subsequent suit against himself.

Certiorari, from Thomas county. Decided by Judge LOVE,
December Term, 1857.

An action was brought in a Justice's Court by Neill McKinnon, against James B. Edwards, for \$50, for hauling a steam engine, boiler and fixtures, for a steam mill, from Newport to Thomasville.

Edwards vs. McKinnon.

Upon the trial, the plaintiff introduced as a witness, *Henry Cherry*, who testified, that between himself and James B Edwards there was an agreement that Edwards was to furnish the said Cherry an engine, for the purpose of starting a mill, and that the profits of the mill, after supporting his (Cherry's) family, and paying expenses, was to go to Edwards, to pay the purchase money and interest, and upon the payment of which, the title of the property was to be in Cherry. The engine was bought by Edwards, and shipped from New York to James B. Edwards, Newport, care of Daniel Ladd. He (witness) made several efforts to get a wagoner to haul said engine to Thomasville, and finally obtained the service of the plaintiff. The engine being subject to Mr. Edwards' order, at Newport, and not to his, (witness,) he (witness) got an order from the defendant for the delivery of the engine to the plaintiff, which was done, and the engine was hauled up to Thomasville, as was agreed upon by the parties. He (witness) tried to borrow money to pay for the hauling. After operating said machinery for a short time, some part of it broke, so that it became necessary for him (witness) to go to Newport to have it repaired, and having no money, Mr. Edwards furnished money for said repairs. After starting again, it was found that something more was necessary in the way of repairs; Edwards becoming dissatisfied, witness proposed that Edwards should sell the engine, which was afterwards done by Edwards, to C. G. Moore; witness told Edwards that the engine could not be sold until the freight was paid for the hauling.

The defendant objected to the admission of this evidence, on the ground that Cherry was an interested party. The Court overruled the objection and admitted the testimony.

James Allen testified, that Cherry applied to him to know where he could get a wagon to haul up his engine, and also where he could borrow \$50 to pay for said hauling, and asked witness to loan him the money.

C. G. Moore testified, that he bought from James B. Ed-

wards the engine; Mr. McKinnon met witness in the street and asked him if he had bought the engine; witness replied that he had, and McKinnon told him that he had a claim on it for hauling the engine for Cherry, and that he had been to see Mr. Edwards to get paid, but Edwards would not pay it.

The jury found for the plaintiff, and the defendant carried the case by *certiorari* to the Superior Court.

After argument, the Court below dismissed the *certiorari*, and Edwards filed his bill of exceptions, alleging that the Court erred,

1st. In ruling that the said Henry M. Cherry was a competent witness; and

2d. In ruling that the evidence in the case was sufficient to authorize a judgment in the Justice's Court for the amount sued for.

SPENSER, for plaintiff in error.

HANSELL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Two questions are made in this case. 1st. Was Henry Cherry a competent witness? 2d. Was the evidence sufficient to justify the verdict.

[1.] We concur with the Court below that Cherry was a competent witness. A judgment in this case would be no bar in a subsequent suit, at the instance of McKinnon against Cherry.

In the case of *Nesbit vs. Lawson*, 1 Kelly, 275, relied on to exclude Cherry, the point was different. Lawson sued Nesbit, as his attorney, for having collected money on a promissory note. Grimes, the debtor, was introduced to prove that he had paid the money to Nesbit. If a judgment had been fixed on Nesbit, by the testimony of Grimes, the right of action against Grimes would have been lost, whether the

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money was collected or not. For the record would show, (and the plaintiff would be bound by it,) that the plaintiff's attorney had already collected the money of the debtor. The interest of Grimes, therefore, was direct and immediate. Not so here; for as we have already said, a judgment against Edwards would not relieve Cherry, unless the money was collected. And even it would not necessarily discharge Cherry from a liability to refund to Edwards. Both of them might be liable to McKinnon, as in the case of principal and agent, where the agency is not disclosed.

[2.] Taking the testimony of Cherry as competent, ought there to have been a recovery against Edwards? Through kindness to Cherry, for no other motive can be inferred from the transaction, Edwards agrees to purchase for Cherry an engine to start a mill; and to allow Cherry to reimburse him when he is able to do so, after first deducting the expenses of keeping up the establishment, and supporting his family. This is no partnership, as has been suggested by the distinguished counsel in behalf of the defendant in error.

The engine is bought by Mr. Edwards and shipped to Newport. The agent of Mr. Edwards at Newport refuses to deliver it to Cherry but upon the order of Edwards. This is obtained by Mr. Cherry, and the engine is delivered to McKinnon, a wagoner, and the plaintiff in the action below, who agrees with Cherry to haul it to Thomasville for fifty dollars. The mill, from some cause or other not distinctly disclosed in the proof, failing to realize the expectation of the parties, is re-sold, by the consent it would seem of Cherry, by Edwards to Moore. And McKinnon, between whom and Edwards there was no contract, express or implied, seeks to hold Edwards liable for the hauling, and so the jury find.

We do not see upon what principle this verdict can be sustained. Edwards never employed McKinnon to do this job. He was under no obligation, legal or moral, to have the engine transported from Newport to Thomasville. Cherry was not his agent for this purpose, so far as the testimo-

my shows. The work was undertaken and performed upon the sole employment of Cherry. Our conclusion, therefore, is that the finding in the Justice's Court was not only contrary to the proof, but *without any* evidence to support it. And consequently, that instead of dismissing the *certiorari*, it should have been sustained, and a re-hearing awarded on that ground.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA
AT ATHENS,
MAY TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

**NANCY BONDS, plaintiff in error, vs. ALLEN, Justice, admin-
istrator, &c., defendant in error.**

The Act of 1856, *Pamphlet* 148, pointing out the mode of ascertaining the relief and support to which widows and orphans are entitled out of the estate of their deceased husbands and parents, &c., does not supersede or repeal the Act of 1850, *Cobb* 297, allowing one hundred dollars worth of a deceased insolvent's effects, for the welfare and comfort of his family.

From Jackson county. Decided by Judge HUTCHINS,
February Term, 1858.

This case came on in the Court below, upon an appeal from the Court of Ordinary of Jackson county, upon the petition of Nancy Bonds, as widow, to be allowed the sum of \$100 out of the estate of her deceased husband, under the Act of the Legislature of the 23d of February, 1850, such estate being insolvent.

Bonds vs. Allen, Justice.

Upon the trial, it was admitted that the estate was insolvent, and that there were many debts which would remain unpaid. It was also admitted that the widow had previously applied to the Ordinary, and that he had appointed appraisers, who under the Act of the 19th of February, 1856, had set apart, from the estate, property, and effects, sufficient for the ample and liberal support of the widow and children, and also sufficient furniture for their use and comfort, and had returned a schedule of the same according to the Act.

The Court below, reversed the judgment of the Ordinary, deciding that the widow was not entitled to the \$100 worth of property under the Act of 1850, that Act having been repealed or superseded by the Act of 1856, which provides for the support and maintenance of the widow and children, out of insolvent as well as solvent estates, represented by executors or administrators, and secures the property and effects set apart for that purpose, from levy and sale for the debts of the deceased.

To this decision, the widow filed her bill of exceptions assigning the same as error.

PITTMAN & HULL, for the plaintiff in error.

THURMOND, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

There is but a single question in this case, and that is, whether the one hundred dollars worth of a deceased insolvent's effects, allowed to the family, by the Act of 1850, Cobb 297, is taken away by the Act of 1856? *Pamphlet 148.*

We have examined the two statutes carefully, and we are unable to discover any conflict between them, so as to make the latter operate as a repeal of the former, by necessary implication. It is not pretended that it is a case of express repeal.

The first Act passed upon this subject, was in 1838, *Cobb* 296. That Act purported to be as it was, for the relief and support of widows and orphans out of the estates of their deceased husband and parents. Then follow two Acts, passed in 1850, upon the same subject; the one dated the 22d and the other the 23d of February, of that year. The Act allowing the one hundred dollars is last in point of time. And it is declared in the 3d section of that Act, that nothing contained in it shall be so construed as to take from widows and orphans any property and rights then allowed to them by law. *Cobb* 298.

And why I ask, should the Act of 1856, be so construed as to take from widows and orphans any property or right heretofore allowed them by law? That is to say, to take from them the one hundred dollars previously allowed by the Act of 1850? But furthermore, does not purport, like its predecessors, to provide for the maintenance of widows and orphans. It is an Act merely "*to point out the mode of ascertaining the relief to which widows and orphans are entitled, out of the estates of their deceased husbands and parents, in cases where letters testamentary or of administration shall thereafter be granted, and for other purposes.*"

Thus it will be perceived, that the main object of the law was to provide a remedy for a case not covered by the previous legislation upon this subject. And while I adhere to the opinion uniformly maintained by this Court, that the general words, "and for other purposes," are sufficiently broad to authorize any alteration of the existing laws, yet it is apparent from reading the Act, that no such change was contemplated as that contended for by the learned counsel for the defendant in error in this case.

And this reminds me that I owe an explanation to the counsel, who argued the case of the *Bibb County Loan Association vs. Richards*, 21 Ga. Rep. 592. The only constitutional question I considered in my opinion in that case, was, whether an Act of the Legislature incorporating that

Mitchell vs. Gillespie.

association, by their Constitution and by-laws, without the same being embodied in the Act, was valid? And if the point was made by the distinguished counsel who argued that case in behalf of the defendant in error, that the Act was void, because the words in the title "and for other purposes," were not a compliance with the Constitution of the State, which forbids any law or ordinance to pass containing any matter *different* from what is expressed in the title, it wholly escaped my notice. I find no such proposition upon the brief; and I take it for granted, that no such objection was made. It had been too long settled to be considered an open question in this Court.

One word in conclusion, and I am done with this case. In favor of the families of insolvent debtors, as well as in kindness to poor debtors themselves, the Legislature are from time to time making provision. Every few years they add something to the stock to be saved from the wreck, whether the policy be wise or not, it does not become me to express an opinion. It is enough for the Court to know, that such is the manifest will of the people, as declared from time to time, through their representatives, and it is our duty to carry out these enactments in the spirit in which they were made.

Judgment reversed.

JAMES C. MITCHELL, plaintiff in error, vs. JAMES L. GILLESPIE, defendant in error.

A recovery in an action of covenant for a breach of warranty of the soundness of a slave, may be pleaded in bar of a second action for a false warranty of soundness of the same slave, on the same sale.

Case, from Franklin county. Decided by Judge HURON-
ESS, April Term, 1855.

For statement of this case, see opinion of the Court.

AKERMAN & COOPER, for plaintiff in error.

W. H. HULL; and G. HILLYER, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

This case comes up from the Superior Court of the county of Franklin, on a demurrer to the defendant's plea. It appears, that on the fourteenth day of October, eighteen hundred and fifty-one, the defendant sold to the plaintiff three negroes, for which the plaintiff paid him twelve hundred dollars. The defendant executed to the plaintiff a bill of sale, under seal, for the negroes, and warranted them to be sound and well in body and mind.

One of the negroes having been unsound at the time of the sale and warranty, the plaintiff sued the defendant in an action of covenant, alleging, as a breach of the covenant, that the said negro was, at the time of said warranty, unsound in body, and wholly unfit for labor, or service, and became and was of no value or use whatever to the plaintiff; and that the defendant had wholly neglected and refused to make compensation to the plaintiff for the said injury. On the trial of that cause, at April Term, 1855, of Franklin Superior Court, the jury rendered a verdict in favor of the plaintiff, for the sum of four hundred and fifty dollars, on which judgment was entered up.

The plaintiff sued the defendant in a second action, returnable to the October Term, 1855, of the same Court, for a false warranty in the same sale of the negroes, but suing additionally for the recovery of the physician's bill, expenses of nursing, &c., of the negro when sick, as damages not

claimed in the former action. The defendant pleaded the former recovery in bar of this action. At October Term, 1857, the demurrer was argued, or as expressed in the record, the question was argued "whether the former recovery, pleaded in bar by the defendant, was conclusive against the plaintiff in this action." The Court decided that the former recovery was a bar, but desiring to hear further argument, an agreement was entered into by the counsel, and entered on the minutes, that a nonsuit should be awarded, with leave to the plaintiff to reinstate the case on the ground of error in the said decision, and that the motion be considered as made and stand for argument at the then next Term of the Court. At the succeeding Term of the Court, to-wit, at April Term, 1858, argument was heard by the Court, and the motion to reinstate was refused, and the case was ordered to be dismissed, on the ground that the second action was for the same breach of warranty for which the recovery had been had. To this decision the plaintiff's counsel excepted, on three several grounds, to-wit:

1st. That the Court erred in deciding that the second action was for the same breach of warranty as that on which the former judgment was founded.

2d. That the Court erred in sustaining the defendant's plea of former recovery in bar of the second action.

3d. That the Court erred in ordering the case to be dismissed.

The second suit was brought originally for the recovery of a sum of money which the plaintiff had to pay to William W. Mitchell, to whom he had resold one of the said negroes, with a warranty of soundness. At a subsequent Term of the Court, the declaration was amended, alleging fraud in the sale of the negro, by the false and fraudulent representations of the defendant to the plaintiff, of the soundness of the negro, when he knew that she was unsound. The plaintiff avers, in his said amended declaration, that "at the time of the purchase of the said slave from the defendant, and long

before, she was not sound, but was, and had been long unsound and seriously afflicted, &c., &c., and still is afflicted as aforesaid, and is of no value;" all which is and was, at and before the time aforesaid, well known as aforesaid to the defendant; by means of which afflictions, unsoundness and diseases of the said slave, she became and was, at the time aforesaid, sick, and has been and still is confined to her house and bed; and the plaintiff was and has been forced, and necessarily compelled to pay, lay out and expend divers large sums of money, to-wit, the sum first aforesaid in and about the nursing, feeding, clothing and taking care of said negro slave, and in physician's bills, in trying to have her cured of the diseases and sickness aforesaid, &c." Taking the record for our guide, the second suit is brought for the recovery of the value of the diseased slave, and for the expenses of nursing, feeding, clothing, and taking care of her, and for the physician's bill. The damage sustained by the plaintiff, on account of the diseased condition of the negro, at the time of the sale, was recovered in the former action, but there was no allegation of damage, in that case, resulting from the sickness of the negro, such as are set forth in the second action, and it is insisted that the plaintiff is not barred from the recovery of these damages in this action. There was no offer by the plaintiff to rescind the contract. Three negroes were sold together, for a gross sum, and embraced in the same written contract. The warranty extended alike to all of them. If the plaintiff wished to rescind the contract, as it was one and entire, he ought to have offered to return all the negroes, and demanded the return of the consideration money. He did not do it. He did not offer to return the diseased negro; upon which offer, however, he would not have been entitled to a rescission of the contract, for it could not have been rescinded in part, by one of the parties only. The first action, then, was for a breach of the warranty, claiming damages for the injury the plaintiff had sus-

tained by said breach. He recovered them. It is not necessary to go into the enquiry if he could have recovered more, if he had averred, that in consequence of the breach, he had been put to the expense of feeding, clothing and nursing the negro when she was sick, and of paying medical bills. It is sufficient to say that, in modern practice, whenever *such expenses* may be recovered in cases of a false warranty, they may be recovered equally and to the same extent on an express warranty without fraud. In both cases the vendor may rescind the contract by returning the property within a reasonable time after the purchase, and in each case, he may recover damages for the expenses named, and the evidence offered in proof of them must necessarily be the same. The first action was brought on the express warranty, and the present action on a false warranty of the soundness of the same negroes on the identical sale. The warranty is the same, but the plaintiff seeks, in the latter action, to increase the damages by the averment of fraud in the warranty. The fact that there was fraud, if it were so, cannot add to the expense of feeding, clothing and nursing the sick negro, nor can it add to the amount of the physician's bill. These expenses the plaintiff might have recovered in the former action, if he could make proof to entitle him to them in this action, and he must not be allowed to sue on the same identical demand. If this were permitted, he might bring several distinct actions for each particular item in the sum of items which constitutes the aggregate damage for the breach of a single contract, viz; one suit for the loss of the service of the negro, one for her diminished value, another for nursing her, and so on. This must not be allowed.

It was said in argument, that this Court had decided in *Badgett vs. Broughton*, 1 *Kelly* 592, that the measure of damages in an action of covenant for a breach of warranty of the soundness of a slave, is the difference between the price paid, and the value of the slave in her unsound condition; and that, therefore, the expenses sued for now could not have

been recovered in the former action. That decision was made on the facts of that particular case. There was no claim of damage except for the loss of the slave, who had died.

The expenses of medical attendance, nursing, &c., were not sued for, and not asked on the trial, and this Court, in delivering its opinion, was particular to say, that if the jury had found a special verdict, setting forth the facts as stated in the record, "the measure of damages would have been, in judgment of the law, *at least* to the extent stated by the Court to the jury," which is that stated above. It was not decided that if sued for, other damages could not have been recovered. The contrary is implied.

It is unnecessary to decide, that in cases of false warranty, damages of some description may not be recovered, to which the plaintiff would not be entitled when the warranty was made in good faith, and without mixture of fraud. But we do hold, that where damages resulting from the breach of the warranty, are of a sort that may be recovered in either form of action, the recovery in one will bar the plaintiff's right to sue in a second action. The evidence of the damage in that respect, must necessarily be the same in both actions, and it is the plaintiff's own fault if he omitted averments in his declaration, which were necessary to admit proof of them. The defendant must not be harrassed with a multitude of suits growing out of the same cause of actions.

The order or judgment of the Court dismissing the action, was simply an act of supererogation. The cause was already out of Court by the judgment of nonsuit, and plaintiff's motion was to set aside the nonsuit, and reinstate the case.

Judgment affirmed.

Executors of JAMES Nolan, plaintiffs in error, vs. JAMES N. BOLTON and others, defendants in error.

A testator used this language in his will, "it is my will and desire, that at the division of my property, each one," (legatee,) "shall be charged with, and account for in said division, all money or property they have received from me, so as to make them share equally in the property to be divided, and in advances."

Held, that the legatees were bound to account for all money "received" by them, as much that received by them, as a loan, as that received by them, as an advancement.

Equity, from Wilkes county. Decided by Judge Thomas, March Term, 1858.

The bill of complaint in this case was filed by James N. Bolton and others, legatees under the will of James Nolan deceased, against John West and another, executors under the said will for an account.

The testator James Nolan, in the last item of his will, after appointing his executors proceeded as follows, "and it is my will and desire that at the division of my property each one shall be charged with and account for in said division all money or property they have received from me, so as to make them share equally in the property to be divided and in advances."

During his lifetime the testator had advanced to his son-in-law Charles L. Bolton, divers sums of money for which he held Bolton's notes and receipts, at the time of his death, and the question was, whether the complainants should account for these notes and receipts as advances under the above clause in the will, in the division of the testator's property.

The respondents submitted the following evidence to show the liability of the complainants, to account for these notes and receipts of Charles L. Bolton.

John H. Dyson, who testified that he wrote the will of Nolan, 12th of June 1856. The instructions to him by Nolan were to put in the will, that Polly Bolton's children were to

be charged with the amounts of money he had let Col. Bolton have. In drawing the will at first, this was left out. After it was first drawn and read over to him, he said you have left it out, that he believed with West there would be no difficulty, but with Bolton he knew there would be, unless it was plainly stated in the will. He asked me if the laws of the State would not make them account for advances, to which witness replied that he thought not, unless so stated in the will when a man made his will. He said nothing about intending these notes and claim on Col. B. originally as advances, nothing about Col. Bolton ever agreeing they should be advances; nothing about Col. Bolton's owing him, but said there was a bundle of old papers in his possession which would show what money he had let Col. Bolton have. In a will written some 12 or 15 years since, Mr. Nolan provided that Col. Bolton was to account for money he (Nolan) had let Col. Bolton have. Mr. Nolan frequently and uniformly spoke of the money he had let Bolton have—never as money owing by Bolton.

Complainants, counsel requested the Court to strike out all the testimony, as not making out a case against the complainants. This motion was overruled by the Court.

The Court charged the jury as follows: "Gentlemen of the jury, as a general rule, money evidenced by promissory notes cannot be considered as an advancement; and in order to change it from a debt to an advancement you must believe, from the testimony, that it either was a gift by agreement, at the time the respective notes were received, or became so subsequently by agreement."

"Further, the Court charges you that at the time the will was written, if the notes remained debts up to that time, they were not changed by the testator in the will, from a debt to an advancement."

"The respondents have specially requested me to charge you as follows, that the jury should deduct from the portion

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of these complainants, whatever sums of money may have passed, from time to time, into the hands of Bolton, from Nolan; whether notes were taken for such sums or not, which I refuse to do."

"Further respondents request me to charge, that when a man uses a word having a legal meaning, he is presumed to use it in that sense, when speaking of legal matters, unless a contrary meaning appears, and if Nolan said these notes in controversy were advances to Bolton, he is to be presumed, unless the contrary appears, to have used the word "advances" in its legal sense, and it is to be understood, unless the contrary appears, that all had been done which was necessary to be done, in order to constitute them advances! which I refuse to do. Further, respondents request me to charge, that the jury have a right to consider all the circumstances of the case, if proven, such as the relation of the parties, the date of the notes, their being out of date, the permitting C. L. Bolton to leave the State, the terms in which Nolan spoke of the papers in order to ascertain whether the notes were memoranda of advancements originally, or whether the notes were subsequently arranged by Nolan and Bolton, to stand for 'advancements', which I charge to be the law."

The Jury returned a verdict for the complainants: that they were not bound to account for the notes and receipts offered in evidence; and the respondents filed their bill of exceptions assigning the same as error.

RESE, for plaintiffs in error.

BARNETT & THOMAS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

What was it that the testator meant the legatees to "be charged with and account for." The defendants in error, say, that it was only gifts—*advancements*; that it was not *loans*.

His words are: "it is my will and desire that at the division of my property, each one shall be charged with, and account for, in said division, all money, or property they have received from me, so as to make them share equally in the property to be divided, and in advances."

First, let us take the words, ending with "*me.*"

"All money or property they have received from me," is an expression which, taken by itself, is broad enough to include all money or property that had proceeded from the testator to the legatees, whether it had proceeded as a gift, or as a loan. In a gift, the thing given, is "*received*" by the donee; in a loan, the thing loaned is "*received*" by the borrower. *Received*, may be equally predicated of both a gift and a loan.

It is the clear import, then, of the words ending with "*me,*" that the legatees were to account for whatever they had received from the testator, whether they had received it as a gift, or, as a loan. It follows, therefore, that they must account for whatever they received from him unless the subsequent words, by an import at least equally clear, relieves them from the duty of accounting for some part, or the whole, of what they may have so received.

Let us then go to the subsequent words. Do they, to any extent, relieve the legatees from this duty?

Those words are "so as to make them share equally in the property to be divided and in advances."

The word *advances* means, say the counsel for the defendants, gifts—*advancements*; and *does* not mean loans; and, thence it follows, they insist, that the testator, notwithstanding the breadth of his first words, could not have meant the legatees to account for loans.

But, in the first place, the word, "*advances,*" when taken in its strict legal sense, does *not* mean gifts—*advancements*, and *does* mean a sort of loan; and when taken in its ordinary and usual sense, includes both loans and gifts—loans more readily, perhaps, than gifts.

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"ADVANCES, *contracts*, are said to take place, when a factor or agent pays to his principal, a sum of money, on the credit of goods belonging to the principal, which are placed, or are to be placed, in the possession of the factor or agent, in order to reimburse himself out of the proceeds of the sale." *Bouv. Law Dic.* This gives the strict legal sense of "*advances*;" and according to this, advances are *loans*, and nothing more.

"ADVANCEMENT, is that which is given by a father to his child, or presumptive heir, by anticipation of what he might inherit." *Id.* This is the strict legal sense of *advancement*; and it shows that *advancements*, and *advances*, when both words are taken in their strict legal sense, mean quite different things, the former, gifts; the latter, loans.

In ordinary usage, what is the sense of "advances?"

It is in every body's mouth to say, that a man obtained an *advance* on his cotton, or on his watch, or on his own note, and the meaning is, that the man was accommodated with a *loan* on the security of the cotton, the watch, or the note.

"ADVANCE," "6. A giving before hand; a furnishing of something, on contract, before an equivalent is received. 7. A furnishing of money or goods for others, in expectation of reimbursement; or the property so furnished." *Webster's Dic.*

In ordinary usage, therefore, the word, advances, includes loans, and, perhaps, gifts. The counsel for the defendants, however, admit that it includes gifts; they say, it includes nothing else.

Whether, then, we take the word according to its meaning *in law*, or, according to its meaning *in common usage*, we must say, that the word includes *loans* as well as gifts.

More; we must say the same, if we take the word in the sense in which, according to the testimony, the testator *actually used* it.

According to the testimony, he meant the Bolton children to account for the money represented by the "bundle of old papers." Now, admit that the money represented by those

old papers, was loaned money, as the counsel for those children say, then, it must follow, the testimony being the criterion that he meant the children to account for *loaned* money.

And, in the second place, suppose it true, that the word, *advances*, as used in the will, does mean advancements, and does not mean loans, yet is it true, that it thence follows necessarily, that so much of the meaning of the previous words, as requires loans to be accounted for, is cancelled?

I think not.

The word, *advances*, is found in connection with the words, "the property to be divided," the whole expression being, "so as to make them share equally in the property to be divided, and in *advances*."

Is not the money the testator had due him on loan, to be included in the words, "the property to be divided?" They are certainly capable of including such money.

I think so.

And then, is it the dictate of reason, that the testator should wish his children to account for what was theirs, *advancements*, rather than for what was his, *loans*.

The testator may well have meant by the two terms taken together, "the property to be divided," and "*advances*," to cover all the ground which he had previously covered by the words, "all money or property they have received from me."

[1.] Upon the whole, then, we think, that the subsequent words do not as clearly import, that loans were not to be accounted for, as the prior words import that both *loans* and *gifts* were to be accounted for; and, consequently, we think that the subsequent words did not neutralize the prior words. The prior words not being neutralized, it follows, that they must have their full effect. And to have their full effect, the Bolton children must account for *loans*, as well as for *advancements*. We think, they will have to account for both.

This being our conclusion, it must follow, that we think the following charge erroneous.

"Further, the Court charges you, that the time the will was written, if the notes remained debts up to that time, they

were not changed by the testator in the will from a debt to an advancement."

What the Court meant by this charge, was, that if what the notes represented in the beginning were debts, and if those debts remained debts up to the making of the will, (that is, if they were not changed by the joint act of the testator and Bolton, into advancements,) the children of Bolton, were not bound to account for them.

If the testator meant those children to account for them, whether they were debts or advancements, as we have come to the conclusion that he did, then the children were bound to account for them, whether they remained in the form of debts, or were changed into the form of advancements. That the testator had the right to give his bequests on what terms he pleased, nobody will dispute. He might, therefore, give them, on the terms, that the legatees should account for money lent to them, or to their father.

What has been said, sufficiently disposes of the other charges, and the refusals to charge.

A single question remains, though it is not a question which the case, in the view that has been taken of it, requires to be decided.

Was the parol evidence admissible? Even if it was not admissible, there ought to be a new trial, as there was an error in the charge. But we are strongly inclined to think, that it was admissible.

In the view we take of the will, it is not true, that this evidence contradicted the will. The words of the will were broad enough to cover both loans and advancements, and to require an account of both. The parol evidence showed, that what the notes represented, was to be accounted for, whether what they represented, were loans or advancements. Here was no conflict between the parol evidence, and the words of the will.

Nor is it true, as we strongly incline to think, that the evidences being of the sayings of the testator, made it inad-

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missible. The sayings were uttered at the time of the making of the will, and in connection with the act of making the will. They, therefore, were a part of that act, a part of the *res gestæ*. So I think. Then, they were sayings against interest, if the counsel for the defendants are right in contending that they go to show, that the notes represented *advancements*.

Advancements are gifts; and it is less to a man's interest, to admit a thing to be a gift, than it is to admit it to be a loan even though as a loan, it may be barred by the statute of limitations.

There can be no motive, in a matter of this sort, for a testator to say what is not true. If he wants to withhold his property from any one, he can do it, with or without a reason.

Judgment reversed.

HENRY FREEMAN, plaintiff in error, vs. THOMAS B. NORWELL,
defendant in error.

If, in trover and bail under the Act of 1821, the defendant proves unable to give the bond, and the plaintiff gives it, and receives possession of the negroes, and then dismisses his action, and fails to restore the negroes to the defendant, such dismissal and failure amount to a breach of his bond.—BENNING J.

Trover, from Lincoln county. Decided by Judge THOMAS,
April Term, 1858.

An action was brought in the Court below by Thomas B. Norwell, against Henry Freeman, to recover the penalty under a bond, on account of the breach of the condition of the said bond.

The condition of the bond was as follows:

"The condition of the above obligation is such, that where-

as, the said Yancey G. Freeman, committee as aforesaid, did commence his action of trover against the said Thomas B. Norwell, returnable to the March Term of the Superior Court of said county, 1857, for three certain slaves, to-wit: Jane, a woman about thirty-eight years of age, of dark complexion, and Crese, a woman about twenty-eight years old, and her boy child (name not known,) about five years old, of the value of \$1,600; and the said Thomas B. Norwell having failed and refused to give bond and security for the forthcoming of said negroes, according to law. Now, should the said Yancy G. Freeman, well and truly produce said negroes to answer such judgment, execution or decree, as may be issued or rendered in the case, and well and truly pay the eventual condemnation money recovered in said case, then this obligation to be void, else to remain in full force and virtue."

The plaintiff in his declaration, after setting out the above condition, stated that the condition of the bond had been violated; the said Yancy G. Freeman, for whom, and with whom the said Henry Freeman became jointly and severally bound, having dismissed his action of trover, and had judgment of dismissal entered on the minutes of the said Court, and a judgment for the costs of said suit rendered against him, on the 24th day of March, 1858; and that on the 2d day of April, 1858, he (the plaintiff,) demanded the said negroes, and the said Henry Freeman refused to deliver the same, having previously removed them to the State of South Carolina, the residence of the principal, in order to prevent the plaintiff from recovering the same, according to his undertaking.

To this declaration, the defendant demurred, on the ground that the same was not sufficient in law to enable the plaintiff to maintain his action.

After argument, the Court overruled the demurrer, and the defendant excepted, and filed his bill of exceptions, assigning the same as error.

STEPHENS. for plaintiff in error.

REESE, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Norwell, the defendant in the original action, having failed to give the bond required to be given by the Act, (of 1821,) Yancy G. Freeman, the plaintiff in that action, gave it, and thereupon, received the possession of the negroes for which the action was brought, Yancy G. Freeman then dismissed his action, (a judgment of dismissal being entered,) and, instead of restoring the negroes to Norwell, held on to them.

Was this a breach of that condition of his bond, which required, that he should “produce said negroes, to answer such judgment, execution, or decree, as” might “be issued or rendered in the case?”

I think that it was. I think, that *the judgment* of dismissal by itself, gave to Norwell the right to an *immediate* restitution of the negroes, and rendered it the duty of Freeman, to make the restitution. This, I think, was the *legal effect* of the judgment.

Such, I understand to be the effect of the reversal of a judgment under which money has been paid. “If judgment be *reversed*, the party shall be restored to all that he has lost by occasion of *the* judgment; and a writ of *restitution* shall be awarded. When the plaintiff has execution, and the money is levied and paid, and the judgment is afterwards reversed, there, because it appears on the record, that the money is paid, the party, we have seen, shall have restitution without a *scire facias*; for there is a certainty of what was lost: otherwise where it was levied but not paid; for there must then be a *scire facias*, suggesting the matter of fact, viz: the sum levied, &c.” 2 *Tidd’s Pr.* 1186.

Here, it seems, that the right to have restitution on the one

part, and the duty to make it on the other, is the direct result of the mere judgment of reversal, *per se*.

Indeed, I believe, that we are all agreed, that the judgment of dismissal did have the effect, to confer on Norwell the right to an immediate restoration of the negroes, and to impose on Freeman the duty of making that restoration.

Freeman failed to restore them, was not that a failure to "produce" them "to answer" the "judgment" "rendered in the case?" I think it was. The judgment of dismissal in legal effect, said to Freeman, restore the negroes. He failed to restore them. This was failing to produce the negroes, to answer the judgment.

I think, then, that the judgment of dismissal, followed by the failure to restore, was a breach of the condition of the bond; and therefore, that the demurrer to the declaration, was well overruled by the Court below.

I admit, that Norwell might have entered up a judgment for restitution against Freeman, or have had a writ of restitution against him without entering up such a judgment; but, I think, that there was no *necessity* for Norwell's doing either, in order to make it his right to have, and Freeman's duty to render restitution; this right and this duty, having already, as I conceive, resulted from the judgment of dismissal. Indeed, if they had not, Norwell could not be entitled to enter up judgment of restitution, or entitled to cause to be issued, the writ of restitution without entering up such a judgment; the title to do either, depending entirely upon such right as he derived from the judgment of dismissal.

Judge McDonald thinks, if I understand him aright, that a judgment of restitution, or, at least, a writ of restitution, was *necessary*, before there could be a breach of the condition.

I have given my reasons for thinking neither *necessary*. I think, that requiring either, in cases of this kind, would also be *inexpedient*. If either were required, it would also be necessary to require, that it should be founded on *notice*

to the party in possession ; otherwise requiring it, would be worthless to him ; and in many cases, as in this, (according to the declaration which is admitted by the demurrer,) he would be out of the State, beyond the reach of notice. In such cases therefore, requiring a notice, would be denying redress ; and that would, practically, be taking part with one who, armed with his wealth alone, has abused the very law itself, to wrench from the hand of poverty, what is, perhaps, its all.

I think the judgment ought to be affirmed.

Judgment affirmed.

LUMPKIN, J. concurred.

MCDONALD, J. dissenting.

Yancy G. Freeman, committee of the person and property of Franklin Freeman, a lunatic, commenced an action of trover against Thomas B. Norwell, in the Superior Court of Wilkes county, returnable to March Term, 1857, of the said Court, for the recovery of three slaves. The said Norwell having failed and refused to enter into bond and security to have the said slaves forth-coming to answer such judgment, execution or decree as might be rendered in the case, according to law ; the plaintiff, Yancy G. Freeman, entered into bond with securities, conditioned to be void if he should "well and truly produce said negroes to answer such judgment, execution or decree as may be issued or rendered in the case, and well and truly pay the eventual condemnation money recovered in said case."

Thomas B. Norwell instituted suit on said bond against Henry Freeman, security of said Yancy G. to said bond, returnable to April Term, 1858, of the Superior Court of Lincoln county, setting forth the above facts and setting out the bond substantially, and annexing a copy to his petition. He avers a breach of the condition of the bond in the following

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words, to-wit: "and which condition has been violated thus: At March Term, 1858, of the Superior Court of said county," (Wilkes) "said Yancy G. Freeman for whom and with whom said Henry Freeman," (the surety) "became jointly and severally bound, dismissed his said action of trover, and had judgment of dismissal entered on the minutes of said Court, and a judgment for the costs of said suit rendered against him on the 24th day of March, 1858, and on the third day of April, 1858, on demand of your petitioner for said negroes, said Henry Freeman refused to deliver the same to your petitioner, having previously removed the same to the State of South Carolina, the residence of the principal, in order to prevent your petitioner from recovering the same, according to his said undertaking, and thereby broke the condition of said bond, as your petitioner avers."

The defendant appeared and demurred to the plaintiff's declaration. The Court overruled the demurrer and the defendant excepted.

To the judgment of this Court sustaining the decision of the Court below, I dissent.

This is an action at law under Jones' Form of Pleadings, for the recovery of damages for the breach of the condition of a bond. The plaintiff, according to the practice of our Courts, has assigned, in his declaration, the breaches of the condition of the bond on which he relies for a recovery. There was no suit against Yancy G. Freeman, for whom Henry Freeman was surety. There was no judgment, execution or decree, issued in the case against him, except a judgment for the costs, and there is no averment that they were not paid. There was no condemnation money recovered from Yancy G. Freeman in the case on which the bond was given, nor was it possible that any could be recovered from him in that case. The surety alone is sued and he is bound by the letter of his contracts. But if such were not the case, the most free construction of his undertaking in the bond, could not hold him bound for the production of

the negroes to answer a judgment for the costs of a dismissed action.

The Court is of opinion that the voluntary dismissal of the action and the judgment for the costs of the suit entered thereon is, in effect, a judgment for the restitution of the property, which was turned over to the plaintiff. I cannot so regard it. The judgment rendered, was an ordinary judgment for costs, and when the costs are paid the judgment is satisfied and the bond imposes no obligation on the party or his surety to produce the negroes to answer a satisfied judgment. But it is said to be a judgment for the restitution of the property to the defendant, which the plaintiff has wrongfully obtained from him under color of legal process. I cannot think so. I cannot make a judgment for costs, a judgment for restitution. They are essentially distinct. If the judgment for costs be a judgment of restitution, a process should go to the Sheriff to make restitution. What kind of process would the Clerk issue in such case?

This case is likened to the case of a writ of restitution awarded to a party in England, who obtains a reversal of a judgment which has been executed. I cannot see the analogy. This is a proceeding upon a contract, a bond containing stipulations. It is a suit at law in which the parties are bound down by their contract. The defendant has a right to call for the judgment, execution or decree, or the judgment for eventual condemnation money, to answer which his principal was bound to produce the negroes. That must be tried by the record, and confessedly there is none save a judgment for costs; there can be no judgment by inference or implication. The parties certainly did not stipulate to produce the negroes to answer a judgment for costs.

But what is there in the plaintiff's petition or declaration, which shows that the plaintiff is entitled to the restitution of the negroes, or that they were ever in his possession?

It does not appear that an affidavit was made by the plaintiff requiring the defendant to enter into a recognizance with surety for the forth-coming of the negroes to answer any judgment, execution or decree, and that a process or order was given to the Sheriff requiring him to take it, or that it was in consequence of the defendant's failure to enter into such recognizance, that the negroes were taken from his possession and placed in the possession of the plaintiff. If we are to arrive at the conclusion that such was the fact, we must do it by argument and inference, for we are not informed of it by averments in the declaration.

It was asked in argument if the party is to be left without a remedy? It is sufficient for me to say that in my judgment; he is not entitled to the remedy sought in the record, according to the facts which the record presents. But I will say it may be possible, that if the defendant had applied to the Court below, upon the dismissal of the plaintiff's action on his own motion, it would have ordered the plaintiff to restore to the defendant the slaves sued for, if they were indeed obtained from him in the manner alleged in the argument, but which does not appear in the record. The Court might have held, on such an application, that the plaintiff could not be allowed to use its process to obtain surreptitiously, the possession of property, without a trial of the title, which it was the main object of the statute, under which the proceeding was had, to prevent. If the Court had so ordered, that order might have been held a sufficient judgment under the terms of the bond for the foundation of a suit, if the negroes had not been produced to answer it. I state these things supposititiously, because the case does not call for a decision upon the matters suggested. But a mere order or judgment to restore the property, would not afford the party a full or complete remedy for the injury done him, for he would be entitled to the hire. Hence perhaps, the ancient writ of restitution, awarded by the Court on the reversal of a judgment, might furnish a guide for a proceeding

which would enable the party to obtain his rights. By that writ the party was not in all cases restored to his property, for it may have been sold to a third person under a writ of *feri facias*, but in that case he would be entitled to the money for which it was sold; and if the property had been delivered to the plaintiff upon an *elegit*, the defendant would be entitled to a restitution of the property and the profits made during the possession of it by the plaintiff. The writ of restitution directs an enquiry into the profits made by the plaintiff from the property. *Cro. Jac.* 246, 698.

But I apprehend that, if the plaintiff had in such case in England, entered into a bond to account for profits, ascertained upon enquiry under a writ of restitution, an English Court would not hold that there was a breach of the bond, if no writ of restitution had been awarded.

Is it not probable that the Legislature may have intended, that in case where bail might be required, the defendant, who, from his inability to give security, should be compelled to deliver the property to the plaintiff, who should give a like bond unto that required of him, should become the plaintiff in the action for the trial of the title? Under such construction, no difficulty could arise as to the remedy upon the bond.

I regret to differ with my brethren in their views of the party's liability, but as I am clearly of the opinion that the plaintiff's declaration shows no breach of the condition of the defendant's bond, and that is made the foundation of the action, I think the judgment of the Court below ought to be reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT SAVANNAH,
JUNE TERM, 1858.

Present—JOSEPH H. LUTPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

SAMUEL WARNER, plaintiff in error, vs. JOSEPH A. GRAVES,
et al., defendants in error.

- [1.] A plaintiff in equity being allowed by the Court to dismiss his bill without prejudice, may move to re-instate his cause.
- [2.] The cause should be re-instated in Court if the necessity for its dismissal was superinduced by the error of the Court.
- [3.] When the bill seeks to set aside a deed, and prays that the defendant may be compelled to produce it in Court, and deliver it up to be cancelled, and the plaintiff annexes a copy to his bill, which defendants admit to be a true copy, and the defendants, moreover, file a cross bill, and attach a copy of the same deed as an exhibit, the Court, on motion of plaintiff, may and ought to compel the defendants, at the hearing, to produce the original deed, to be read in evidence.

In equity, from Burke county. Decided by Judge Holt,
April Term, 1858.

This cause, wherein Samuel Warner was complainant, and Joseph A. Graves and Anderson P. Longstreet were defendants, and in which cause the said Joseph A. and Anderson P. had filed their cross bill, came on for trial upon appeal on the bill and cross bill; and the said parties being at issue upon a special jury, Warner moved the Court to compel the said Joseph A. and Anderson P. to deliver in Court, to be read in evidence to the jury, two certain deeds, copies of which had been made exhibits to the original bill, and which were charged as having been obtained through fraud, and were prayed to be cancelled. Which motion was resisted by the counsel for the said Joseph A. and Anderson P., and overruled by the Court, and to which ruling and decision of the Court the counsel of the said Samuel Warner excepted.

And in the further progress of the trial of said cause, the said Samuel, by his counsel, moved the Court to be allowed to read in evidence before the jury, the copies of said deeds, which were made exhibits to said original bill, and which defendants, in their answers, had admitted as being true copies of the originals in their possession, which latter motion was likewise resisted by the counsel for said Joseph A., and Anderson P., and overruled by the Court, the said Samuel, by his counsel, excepting. Upon the said rulings and decisions by the Court, the said Samuel, by his counsel, moved the Court for leave to dismiss his said cause without prejudice, which the Court allowed, and the cause was withdrawn from the jury and dismissed accordingly.

During the same term of the Court, the said Samuel Warner, by his counsel, moved the Court to re-instate said cause on the following grounds:

1st. Because the Court refused the motion of complainants, that defendants deliver into Court the original deeds, called for in the bill, and of which defendants admitted the exhibits by their answers to be true copies.

2d. Because the Court refused to allow complainants to

read the copies of the deeds exhibited to the bill, though admitted by the answers of defendants to be true copies, and defendants' refusing to deliver the originals, though called for by the bill, (as contended by the counsel for said Samuel Warner.)

3d. Because complainant's counsel was taken by surprise, in the non-production of said deeds, in the trial on appeal, in the last resort, when they had been brought in and delivered, and read in evidence, on the first trial.

4th. Because the Court decided that the call by the bill for the production of the deeds, was not sufficient.

This motion, after argument, was overruled, and the following order passed by the Court: "A motion having been made pursuant to notice as above stated, was refused by the Court." Thereupon the said Samuel Warner filed his bill of exceptions, assigning the above decision and rulings of the Court as error.

SNEAD, for plaintiff in error.

SHEWMAKE & DAWSON, *contra*.

By the Court.—McDONALD J. delivering the opinion.

[1.] It is contended that inasmuch as the complainant voluntarily dismissed his bill, he cannot be heard on a motion to re-instate; that this Court has decided that it was constituted to review the judgments of Courts, and not to rectify the mistakes of parties, and that it will not entertain jurisdiction of a cause, the object of which is to correct a party's own error. Without examining the cases on which the counsel for defendants in error rely, it is sufficient to say that no case like this has been referred to as having been adjudicated by this Court. The plaintiff was, by the decision of the presiding Judge in the Court below, driven to the necessity of either submitting to a decree against him by the jury, or of dismissing his bill. In this predicament, he was permitted by the Court to dismiss his bill without prejudice.

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[2.] The terms allowed him by the Court must have some meaning, and it seems fair to us to interpret them as giving the party the right to re-instate his cause, if upon the argument of a motion for that purpose, he should be able to show that the necessity which forced him to dismiss his cause was superinduced by the error of the Court. He made a motion to re-instate. The record shows that *after argument*, the motion was overruled. It does not appear that the Court refused to hear the motion, on the ground that the dismissal of the cause was the voluntary act of the plaintiff; but, on the contrary, the presiding Judge heard argument and refused the motion, thus re-affirming his decisions made during the progress of the cause anterior to its dismissal.

[3.] This brings up for review the decision of the Court on the motion to reinstate the bill, which involves the rulings of the Court during the progress of the case. One of the objects of the bill was to set aside certain deeds conveying negroes, and for their delivery up to be cancelled. The plaintiff annexed to his bill copies of the deed, and called on the defendants to answer as to the copies. The defendants answer, and admit the correctness of the copies. The defendants file a cross bill and annex copies of the same deed thereto. At the hearing of the cause, the plaintiff's counsel moved the Court that the defendants be compelled to produce the deeds to be read in evidence to the jury. The decree of the Court was to operate on the deed. If found fraudulent, they were to be cancelled; otherwise they were to be supported. The mode of proceeding is different in this State from the practice in England. Here, a special jury discharges most of the duties of the Master as well as those of the Chancellor. A party there may compel the production of books, and papers, &c., before the Master for examination, but there is somewhat more ceremony there than here, in obtaining an order for that purpose. *Bennett's Ch. Pr.* 78. But a motion like that made in this case would be granted with-

out notice. *Belton vs. Farrington*, 3d Peere-Wms. 363. The defendants, if taken by surprise, might have asked for time, and upon a proper showing that the papers could not then be produced, time would doubtless have been given; and, in that event, the case must have lain over. We think that no sufficient reason appears in the record for the refusal of the Court to order the production of the deed.

It is not necessary to decide the second point taken in the motion to reinstate, but we are not sure that the Court ought not to have allowed the copies to have been read. They were not only admitted, in the answers, to be true copies, but the defendants manifestly had them in possession; they annexed copies to their cross bill, they conveyed the title on which they expected to sustain the actions at law enjoined, theirs was the proper custody, and if they preferred that the originals should be used, they could have produced them.

It appears no where in the record *as a fact*, that the deeds were produced on the former trial. It is assumed as a fact in the motion, but the Court may have refused the motion on that ground, because the assumption was wrong, and not in accordance with the facts.

The call in the bill for the production of the deeds was sufficient as a foundation for the motion made in the cause.

It is our opinion, therefore, that the presiding Judge in the Court below erred in refusing the motion to reinstate the cause.

Judgment reversed.

Parker vs. Hughes.

HAMPTON C. PARKER, plaintiff in error, vs. WM. HUGHES, JR.,
defendant in error.

[1.] A grant from the State, cannot be set aside in any proceeding, to which the State is not a party.

[2.] The State, by the Governor, cannot be made a party complainant, without the Governor's consent.

In Equity, from McIntosh Superior Court. Tried before
Judge FLEMING at April Term, 1858.

The bill was filed by Parker, and was against Hughes.

It states that Parker, on the 26th of May, 1854, had surveyed, under a head rights warrant, dated the 6th February, 1854, by the Surveyor of McIntosh county, a tract of land containing 595 acres, lying in that county, and bounded on the South by the Altamaha; on the North by lands of William Hughes; on the East by lands, belonging to the estate of Wm. Boggs, and to J. M. Smith; and West by the Altamaha and Farmer's land.

That said survey having been lawfully advertised, Parker applied to the Sheriff of said county for a certificate in terms of the law, that no one was in possession of the land; that the Sheriff refused to give the certificate upon the ground, that Wm. Hughes Jr., of Liberty county, had notified him, that he had obtained a grant for the land.

That this grant is fraudulent and void, in this; that in or about 1853, the said Hughes obtained a warrant from the proper Land Court, for 800 acres of land; that being himself, a surveyor, he located that warrant on the northern side of the Altamaha Swamp, and ran the 800 acres in nearly a square, on that side of the swamp—the two northern lines enclosing said land, ending at the edge of the swamp; that, well knowing that the warrant was already filled without taking in the swamp, or any part of it, he, without marking or running or measuring the lines into the river and through the swamp, wrongfully and fraudulently platted the lines on paper as

though they had been surveyed or marked down to the main channel of the river—fraudulently marking the channel as curving inwards, instead of, outwards, and representing the two North and South lines running (by the plat) through the swamp to the river, as very short, when the real distance was a mile. That thus he made the plat to contain but little over 800 acres, when in truth the tract contained nearly 1500 acres.

That Hughes, well knowing the premises, fraudulently caused and procured the County Surveyor of McIntosh county, to certify said survey, and then transmitted it to the Surveyor General, and fraudulently procured a grant to himself for the land.

That he, the complainant, Parker, located his warrant on that portion of said land, which was so fraudulently granted as aforesaid, the portion lying between the 800 acres to which said Hughes was entitled, and the river.

That he, Parker, had frequently applied to Hughes, to withdraw his objection to the Sheriff's certifying, but that said Hughes always refused to comply with such requests.

The bill prays, that Hughes may be compelled to produce the grant, that it may be cancelled as null and void.

Or, that the grant may be declared null and void so far as the amount of land, say 700 acres, platted, but never surveyed, is concerned.

And, that Parker may have such further and other relief, as the nature and justice of the case may require.

To this bill there was a demurrer on the ground that the complainant had no right to sue, in the matter; and that the grant could only be set aside in Chancery by a writ of *scire facias*, sued out on the part of the government, or by some individual prosecuting in its name.

This demurrer, the Court sustained, and dismissed the bill with costs, refusing to allow the complainant to amend the bill, by making the State a party through the Governor or the Solicitor General of the circuit.

The exception is to this judgment.

GAULDEN, for plaintiff in error.

BACON and LEVY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

This Court has several times held, that a grant from the State, cannot be set aside in a proceeding to which, the State is not a party. 20 Ga. 571. 17 Ga. 547. See *Cressup vs McLean*, 5 Leigh 381. I think, that the proceeding ought to be one in which, the State is the party *plaintiff*. In that case, there cannot arise any conflict between departments of the Government.

[1.] In our judgment the Court was right in sustaining the demurrer?

Was the Court also right in refusing to allow the complainant to amend the bill, by making the State a party through the Governor, or the Solicitor General?

We think so. The Governor or the Solicitor General could not be made a party complainant, without his own consent; and it does not appear, that the complainant, Parker, had obtained such consent; it rather appears that he had not obtained such consent. Besides, it is a question not free from difficulty, whether the complainant, Parker, acquired any right by his survey. If he did not, it is clear, that *he* has no right to sue, and, therefore, clear that no amendment could make a bill of his, good.

This last question was not argued at all on one side, and was not much argued on the other.

We are not prepared to say, that the Court below erred in refusing the amendment.

I remark for myself, that I see no objection to a bill by the Governor to set aside this grant. The case, I feel sure, is one in which, in England, an information would lie. 1 *Dan. Ch. Pr. chap II Sec. 1*. In this State, it may be doubtful,

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whether the proceeding by information, has not been abolished; but whether it has been or not, the Judiciary Act of 1799 says, that "in *all* cases where a common law remedy is not adequate" the Superior Courts shall exercise the powers of a Court of Equity; "and the proceedings in all such cases shall be by *bill*." *Pr. Dig.* 447

Judgment affirmed.

AUSTIN SMITH, claimant, plaintiff in error, vs. **DONALD J. McDONALD**, defendant in error. •

A vendor making an absolute deed to land, and continuing in possession until subsequent debts are contracted; such occupation of the property is a badge of fraud, as against after creditors, notwithstanding the old debts existing at the time of the sale, may have been discharged.

Claim, from Ware county. Decided by Judge Love, June Term, 1857.

This was a claim on the part of Austin Smith to certain property, which had been levied upon under a *fi. fa.* at the suit of *Donald McDonald vs. Daniel B. Smith*.

Upon the trial the following evidence was introduced:

Plaintiff introduced the execution, and the levy thereon by the Sheriff of lot No. 193, in the 8th district of originally Appling, now Ware county.

David J. Miller testified that Daniel B. Smith, the defendant in execution, lived on the lot levied on when the levy was made, and had lived there for six or ten years, and that he granted the land to his son.

Plaintiff also introduced the original judgment on which the *fi. fa.* was founded.

Claimant then introduced a plot and grant from the State of Georgia, of said lot of land made to W. Miller, and an order from the Ordinary of Ware county, allowing Thomas Hilliard, guardian of the said W. Miller, to sell the said lot of land. Also a deed of the said lot from Thomas Hilliard as such guardian to Daniel B. Smith, dated 7th August, 1849, and in consideration of \$50. Also, a deed for part of the said lot of land from Daniel B. Smith to Daniel Smith, dated the 6th of January 1851, in consideration of \$20. Also, a deed for part of the said lot of land from Daniel B. Smith to Austin Smith, claimant.

Thomas Hilliard proved that in 1850, the lot of land was worth about \$100, and that he sold it as guardian of William Miller, at public sale, and that it had been conditionally sold at private sale, that Austin Smith bought and paid for the land at the sale, and directed the deed to be made to Daniel B. Smith his son, and which he (witness) did, accordingly. That about the time Daniel B. Smith sold the land to Austin Smith, Daniel B. Smith was considerably in debt, and owed witness about \$100, and which sum was paid by Austin Smith to the witness, when Austin purchased the land of Daniel B. Smith.

Plaintiff *in fa.* introduced as a witness James T. Clough, who proved that the said lot of land in 1850, was worth \$350, that before and about the time Daniel B. Smith sold it to Austin Smith, witness offered him that sum for the lot of land, and that Daniel B. Smith refused to take it. That Daniel B. Smith, son of Austin Smith, married the daughter of D. J. Miller, and that Austin and Daniel Smith are brothers.

The Court decided that the property levied on and claimed, was subject to the execution.

Counsel for claimant thereupon moved for a new trial, on the following grounds:

1st. The jury found contrary to law.

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2d. The jury found contrary to evidence, and the weight of evidence in the case.

3d. The jury found contrary to law and evidence and the weight of evidence.

4th. The Court erred in refusing to charge the jury, as requested by the counsel of the claimant in writing, "that a subsequent creditor has no right to complain of badges of fraud that existed before his debt was contracted," and charging the reverse thereof.

The Court below after argument refused the motion for the new trial, and claimants counsel excepted.

WARREN & GORDON, for plaintiff in error.

SESSIONS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

I would state briefly in this case, that Daniel B. Smith, the defendant, sold to his father Austin Smith, the claimant, a part of the lot of land levied on in 1850. The consideration proven to have been paid was \$120, for three hundred and forty acres sold, one hundred and fifty acres having been previously purchased by Daniel Smith his brother. Daniel B. Smith was largely indebted when the sale was made to his father; but all the indebtedness existing at the time, has been discharged. Daniel B. Smith, the vendor and debtor, not only remained in possession up to 1854, when the present debt was contracted, which is now sought to be levied; but up to the time even when the levy was made. There was proof showing that the land was worth more than the price for which it was sold by the defendant. The property having been found subject, a motion for a new trial was made upon two grounds, namely; the refusal of the Court to charge as requested by claimant's counsel and for charging

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the contrary thereof to be the law. And secondly, that the verdict was against evidence.

The charge requested was, "that a subsequent creditor has no right to complain of badges of fraud that existed before his debt was contracted." This the Court refused to give, because it did not embrace all the facts applicable to the case. It is conceded, that if a vendor make an absolute conveyance of land and continue in possession, it is a badge of fraud, as against creditors. Had Daniel B. Smith abandoned the occupancy of this land before this debt was contracted, counsel might very properly have asked the charge which he did. But Daniel B. Smith not only remained in possession to the time when the debt was contracted, but to the date of the judgment and the levy. The badge continuing then required explanation as against the subsequent debt, as well as against debts existing at the time of the sale. Indeed the presumption is stronger in favor of the new debts than the old; for they may be supposed to have been contracted, upon the credit given to the defendant on account of his possession and apparent ownership of the property. 1 *American Leading Cases*, 40, 65; 8 *Wheaton*, 228, 252. We need not express our opinion as to the proof in this case. There was evidence going to show, that the land was not sold for a full price. There was testimony of the continuing possession of the vendor; of the relationship of the debtor and claimant. Enough taken together to sustain the verdict. Questions of fraud, are peculiarly for the jury, and we cannot say that the Court manifestly erred in refusing to disturb their verdict.

Judgment affirmed.

SAVANNAH, JUNE TERM, 1858.

Moody vs. Morgan.

JACOB MOODY, plaintiff in error, vs. THOMAS MORGAN, defendant in error.

A bond with security given to a plaintiff in attachment, by the defendant, with a condition to produce the property levied on at the day of sale, is not the bond required by the 11th section of the Act of 1856.

Attachment, from Appling county. Decided by Judge COCHRAN, March Term, 1858.

An attachment sued out by Thomas Morgan, against Hector McDuffie was levied by the Sheriff on a steamboat, the property of the said McDuffie. This steamboat McDuffie replevied, and gave a bond to the Sheriff with Jacob Moody as security "for the amount of the judgment and all costs that he may recover in said case in the event said boat is not delivered on the day of sale."

When the cause came on for trial, Jacob Moody moved the Court to set aside the said bond, and to be discharged as security from the same, on the ground that the bond was not in compliance with the 11th section of the Act of 1856, in relation to attachments and garnishments, for that the said bond was not conditioned to pay the amount of the judgment and costs that he might recover in the case, but conditioned that the defendant should pay the plaintiff the amount of the judgment and costs that he might recover in said case, only in the event that the said property so levied on, was not forth-coming at the time and place of sale.

This motion the Court below overruled, and the said Jacob Moody by his counsel excepted.

McLENDON & ACKINGTON, for the plaintiff in error.

SESSIONS, contra.

By the Court.—McDONALD, J. delivering the opinion.

The 11th section of the garnishment and attachment Act of 1856, (*Pamphlet 27*), makes it the duty of the officer levying an attachment, to deliver the property levied on to the defendant, upon his giving bond with good security, payable to the plaintiff in attachment, obligating themselves to pay the plaintiff the amount of the judgment and costs that he may recover in said cause. It is an absolute bond, without a condition of any sort, which the statute requires. A bond for the payment of the debt and costs absolutely. The undertaking of the obligors to the bond under consideration, is for the forth-coming of the boat levied on, and delivered to the defendant, on the day of sale.

There is a great difference between a bond for the payment of a judgment absolutely; and one for the production of property liable to it, on the day of sale. In the first case, there is no condition, in the second, there is a condition, and that condition is of the essence of the obligation. It cannot be rejected without annulling a most essential part of it, which cannot be done.

Prior to the passing of the Act of 1856, the Sheriff, if he thought proper, might have delivered the property levied on by him by virtue of a *fi.*, *fa.* or other legal process, to the defendant, and a bond taken by him for the delivery of it on the day of sale, or at any other time, was declared to be good and valid in law and recoverable. *Cobb 534.*

The bond in this case does not conform to the Act of 1829, in all respects, but the condition of it is in precise accordance with that of bonds legalized by that Act. It certainly is not the bond required to be given by the Act of 1856, under which it is contended that it is good and valid; and the attachment law must be strictly construed. The judgment of the Court below must be reversed.

Judgment reversed

ABNER SUTTON, plaintiff in error, vs. **EBENEZER SUTTON**,
defendant in error.

- [1.] When the mortgagor against whom a rule is taken, to foreclose a mortgage, makes no resistance, it is not competent for a third person to interpose objections; neither will the Court itself of its motion do so.
- [2.] A discrepancy between the debt and the mortgage given to secure it, may be explained by parol proof; and the creditor will not be driven into equity for that purpose.

Mortgage from Bryan county. Decided by Judge FLEMING, April Term, 1858.

This was an application to foreclose a mortgage which had been made of a tract of land by Ebenezer Sutton to Abner Sutton, for the better securing the payment of certain promissory notes.

Upon the hearing of the application to render absolute the *rule nisi* for foreclosure, which had been granted, the mortgagor made no objection, but one William Strickland prayed to be made a party defendant, and opposed the making of the rule absolute, on the following grounds:

1st. That this Court cannot grant the rule absolute, because the mortgage under which foreclosure is sought to be had, does not specify and locate any particular tract of land; the only description of the premises mortgaged, contained in said deed of mortgage, being too indefinite.

2d. Because the tract of land mentioned in the *rule nisi* is not the tract mentioned in the deed of mortgage.

3d. Because the tract of land described in the said *rule nisi*, is not the property of the defendant Ebenezer Sutton, but the property of William Strickland.

4th. Because the notes mentioned in the said *rule nisi*, are not the notes mentioned in the said mortgage.

5th. Because there are interlineations which are unaccounted for and unnoticed, affecting the validity of the said mortgage.

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Plaintiff's attorneys objected to the said William Strickland being heard and it was agreed at the suggestion of the Court, that the rule should be made absolute, but that such judgment of foreclosure should remain subject to the legal opinion of the Judge.

The Judge subsequently decided that the rule absolute so granted should be set aside.

Plaintiff's counsel thereupon moved the Court to allow him to introduce parol testimony to explain the discrepancy between the notes and mortgage, and to show that the mortgage was intended to secure the notes. This motion the Court refused on the ground that after the setting aside the judgment of foreclosure, the case was out of Court, and that the testimony was inadmissible under any circumstances.

Plaintiff's counsel thereupon filed his bill of exceptions, saying that the Court erred:

1st. In deciding that said William Strickland had no right to be heard in said cause by himself or counsel.

2d. In ruling that parol evidence was inadmissible to explain the discrepancy between the notes offered in evidence and those mentioned and recited in the mortgage, and to show that the notes offered in evidence were the notes intended to be secured by said mortgage: the mortgagor being in Court and not objecting to such evidence.

3d. In setting aside said rule absolute, and in refusing to allow plaintiff's counsel to introduce evidence to explain the discrepancy aforesaid, and to show that the notes offered were the notes intended to be secured by said mortgage on the day said decision was filed.

GAULDEN, for plaintiff.

WARD; OWEN & JONES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

A rule nisi had been taken and duly served to foreclose a mortgage; one William Strickland by his counsel n-

tervened, on application to make the rule absolute, and insisted that there were such discrepancies between the debt and the mortgage, and vagueness in the description of the land, that no foreclosure could be made. Other objections were interposed as to interlineations in the mortgage deed, &c.

The Court granted the rule absolute, but took time to consider the questions made in the case. The mortgagor himself was present in Court, making no objection to the proceeding; and it does not appear that Strickland was any way interested.

At the next Term of the Court, the Judge held that the discrepancy was fatal; neither could it be explained by parol proof, at law; but that the mortgagee must go into equity to reform the instrument. The Court also decided that Strickland could not be heard, but that he would of his own accord refuse the motion.

[1.] We cannot give to this judgment our approval. Why go into chancery when the mortgagor acknowledges by his silence at least, that the mortgage was given to secure the indebtedness included in it? If he was satisfied, who else had any right to gainsay the foreclosure? No one. And we are clear that the Court erred in overruling the motion. Should it turn out that there was fraud and collusion between the parties, which is not pretended, the judgment can be attacked hereafter by any body whom it seeks to disturb, except the mortgagor himself. Sufficient unto the day is the evil thereof.

I would merely add, that by a recent Act of the Legislature, (*Laws, 1857, p. 58,*) mistakes in *grants* may be shown by parol proof, in suits both at law and in equity. It is needless to attempt to exclude parol testimony, as to mistakes in other instruments.

Judgment reversed.

Red. vs. The City Council of Augusta.

**CORNELIUS A. RED, plaintiff in error, vs. THE CITY COUNCIL
OF AUGUSTA, defendant in error.**

[1.] R. petitioned the City Council of Augusta to build two new stalls at a Market House, stating that he would rent one of them at \$300 a year. The Council adopted a motion granting the request. At the next meeting, this motion was reconsidered. It did not appear, but that there was a standing rule making the action of one meeting subject to be reconsidered by the next meeting.

Held, That the jury were at liberty to presume, that there was such a rule, and that if such a rule existed, the Council was not concluded by its first action, but might reverse that action.

[2.] "Speculative damages" are not recoverable.

Case, from Richmond county. Decided by Judge HOLT, October Term, 1857.

An action was brought by Cornelius A. Red, against the City Council of Augusta, for an alleged violation of a contract, entered into between them, for the erection and furnishing of him a stall in the lower Market House of Augusta, for the vending of butcher's meat, and to substantiate which, he produced before the Court and jury, in evidence, drawn from the opposite party, his petition, addressed to the City Council, as follows:

*"To the Honorable the Mayor and Members of the City
Council of Augusta:*

"The undersigned presents this petition to your honorable body and begs your immediate attention thereon. He calls to your attention the fact, that under the arrangement adopted at a previous meeting of your body, regulating the renting of the stalls in the lower Market of the city, he has been entirely excluded from obtaining a stall: and desiring to commence and carry on the butchering business in said market, requests that two new stalls may be erected, at the front or western end of said market; for either of which said

stalls, he is willing to pay an annual rent of three hundred dollars. Respectfully submitted.

CORNELIUS A. RED."

Which petition was presented to council, and accepted, as follows.

"Mr. Jackson moved that the prayer of the petitioner be granted; the motion being put, there was a tie; his Honor the Mayor voting affirmatively, caused the motion to prevail."

After which *A. B. Pickering* was sworn on the part of the plaintiff, and deposed:

"Knew plaintiff in 1855, he was preparing for the butchering business. He purchased one hundred and fifteen head of cattle in August, worth \$10 or \$12 a head. Witness tried to buy from plaintiff, previous to his renting a stall. Knows that plaintiff applied for a stall before the renting by Council came on. Plaintiff was a man of good means and credit—had a pasture. Plaintiff was able to carry on a large butchering business. About \$4 a head profit on butchering. Would have brought in market \$4 more, than if sold on foot. Witness sold a stall to plaintiff in 1856, because, he, witness, was not able to attend to the business. Plaintiff bought cattle in August, before the renting in November. Not unusual to buy cattle as far ahead as plaintiff did. Worth \$1 per head per month to keep cattle. Offal worth 50 cents per head. Red had prepared a slaughter pen."

Isaac R. Tant, sworn on behalf of plaintiff. "Red had \$1,500 worth of stock on hand, at the time of renting, 1st Monday in November, 1855. Had one hundred and fifteen or one hundred and twenty head of cattle on hand. Net profit on beef at that time was over \$5 per head; all stalls suitable for butchering business, were assessed out to others. After plaintiff failed to get a stall, the witness was one of those who bought his stock of cattle from him. After the ultimate failure of plaintiff to get a stall in the market, witness made \$5 profit on the cattle bought of plaintiff.

Red vs. The City Council of Augusta.

The following evidence was offered by defendant from the minutes of Council :

"Mr. Platt moved a reconsideration of the proceedings of the last meeting of Council, granting the renting of a stall, in the lower market, to Cornelius A. Red.

Mr. Jackson moved an adjournment. Lost.

Mr. Jackson moved to lay the matter on the table. Lost.

Mr. Jackson to adjourn. Lost.

Mr. Conley moved a reconsideration of the petition of Cornelius A. Red.

The motion prevailed."

John Foster, sworn for defendant. "Knows that Red could have obtained a stall, at the renting in 1855. Mr. Dye and Mr. Conly, the market committee, told Mr. Red that he could have a stall, which Dwyer had bid off, at the price he agreed to pay, or if he would bid on it, it would be put up again. He, Red, replied, that he would be damned if he would have it; if he could not get a corner stall he would not have any. The stall bid off by Dwyer was an eligible stall, third from the west end of the market. Witness once rented it, and made as much money there as anywhere else. Profits from butchering are fluctuating as other business. If witness killed three or four head of cattle, and four or five sheep, each day made ten dollars profit, was satisfied. Cattle are worth three to four dollars more on the stalls than on foot. The offal about pays for the butchering."

Daniel Kirkpatrick, sworn for defendant: "Red could have obtained a stall at the renting in 1855; agrees with witness Foster in his testimony."

B. Conly, sworn for defendant: "Knows that Red could have obtained a stall. Witness was a member of the market committee, and made the offer to Red, testified to by Foster.

After argument by counsel of both parties, the cause was submitted to the jury, who returned a verdict for the defendant.

During the same Term, the plaintiff's counsel moved for a new trial, in said case, on the following grounds, to-wit:

1st. Because the verdict of the jury, is against evidence, and the weight of evidence.

2d. Because the verdict of the jury is contrary to law in this: The defendant is liable equally as individuals, for the violation of its contracts.

3d. Because the verdict of the jury is contrary to the charge of the Court, in that the measure of damages laid down by the Court to the jury, was such amount of damages as the defendant, should by evidence show, that he had actually sustained, subsequently to the time of the making of the alleged contract: The evidence showing that he had sustained damage after that time, to the extent of the difference between the sale on foot, and being slaughtered and sold as butcher's meat, in the market, of one hundred and fifteen head of cattle; and the verdict was for the defendant, when it should have been under the charge of the Court, for the plaintiff; and in that, the Court charged, that a municipal corporation, was liable for a contract, not under seal, made in pursuance of the regular business of the corporation.

Argument having been heard on the motion for a new trial, the Court below overruled the same on each and all of the grounds taken, and to this decision, the plaintiff filed his bill of exceptions, assigning the same as error.

SNEAD & SNEAD, for the plaintiff in error.

MILLER & JACKSON, *contra*.

Red vs. The City Council of Augusta.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in overruling the motion for a new trial?

All the grounds of that motion, may be considered as included in the first, that the verdict was contrary to the evidence, and to the weight of the evidence.

We do not think this ground well founded.

It is far from clear, that there was ever any *contract* between the City Council and Red.

At one meeting of the City Council, the motion that Red's "prayer" be granted, was carried by the casting vote of the Mayor.

At the next meeting, this action was reconsidered.

[1.] Now was there a standing rule making the action of the Council subject to reconsideration in this way? No proof on the point is in the record. We are therefore permitted, if we are not required, to presume, that there was such a rule.

If there was, then the matter of the petition, was still in an unfinished state, notwithstanding the first action of the Council, and the Council had still the right to ratify or reverse that action.

Especially is this so, inasmuch as, the first action of the Council, even if it was ever communicated to Red, did not lead him, as far as appears, to make new investments, or to engage in new operations of any kind.

[2.] But even if there was proof of a contract, and also of a breach of that contract, there was no proof of any damages, except "speculative damages"—that is, the loss of conjectural profits, and these are too remote and uncertain to be recoverable. So this Court has held in several cases. *Cooper vs. Young*, 22 Ga. R. 269. *The Coweta Falls Manufacturing Company vs. Rogers*, 19 Ga. R. 417.

Judgment affirmed.

Linton & Co vs. Williams.

SAMUEL D. LINTON & Co., plaintiffs in error, vs. CHARLES A. WILLIAMS, defendant in error.

Charles A. Williams bought of S. D. Linton & Co., 100 barrels of flour, at \$5.50 per barrel. The following note or memorandum of the contract was executed by S. D. Linton & Co., through their agent, Mead, and delivered to the agent of Williams.

"C. A. WILLIAMS,

To S. D. LINTON & Co.,

Dr.

To 100 barrels of Sup. Flour, at \$5.50, - - - - \$550.00

To be delivered at any time during the winter when wanted, from this date. Augusta, September, '53.

S. D. LINTON & Co.,
Per MEAD."

On the 31st of January, 1854, Williams called on Linton, tendered in gold the \$550.00, and demanded the hundred barrels of flour, which were refused to be delivered. The value of flour at Augusta, during the winter of 1854, was proven.

Held, that the contract was not within the statute of frauds, but was sufficiently valid to authorize a recovery in damages thereon, for the breach thereof.

Certiorari, from Richmond county. Decided by Judge HOLY, October Term, 1857.

This was a *certiorari*, wherein Charles A. Williams was plaintiff, and the said Samuel D. Linton & Co., defendants, bringing up on an alleged error, from the City Court of Augusta, the proceedings from that Court, in an action on the case by the said Charles A. against the said Samuel D. & Co., for damages, alleged to have been sustained by the said Charles A., in consequence of the failure of the said Samuel D. Linton & Co., to deliver certain flour, under the following agreement.

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To S. D. LINTON & CO.,

Dr.

To 100 barrels Sup. flour, at \$5.50, - - - \$550.00
to be delivered at any time during the winter when wanted.
from this date. Augusta, Sept., '53.

S. D. LINTON & CO.,
Per MEAD."

Red vs. The City Council of Augusta.

By the Court.—BENNING, J. delivering the opinion.

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All the grounds of that motion, may be considered as included in the first, that the verdict was contrary to the evidence, and to the weight of the evidence.

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At the next meeting, this action was reconsidered.

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Especially is this so, inasmuch as, the first action of the Council, even if it was ever communicated to Red, did not lead him, as far as appears, to make new investments, or to engage in new operations of any kind.

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On the 31st of January, 1854, **Williams** called on **Linton**, tendered in gold the \$550.00, and demanded the hundred barrels of flour, which were refused to be delivered. The value of flour at Augusta, during the winter of 1854, was proven.

Held, that the contract was not within the statute of frauds, but was sufficiently valid to authorize a recovery in damages thereon, for the breach thereof.

Certiorari, from Richmond county. Decided by Judge **HOLT**, October Term, 1857.

This was a *certiorari*, wherein **Charles A. Williams** was plaintiff, and the said **Samuel D. Linton & Co.**, defendants, bringing up on an alleged error, from the City Court of Augusta, the proceedings from that Court, in an action on the case by the said **Charles A.** against the said **Samuel D. & Co.**, for damages, alleged to have been sustained by the said **Charles A.**, in consequence of the failure of the said **Samuel D. Linton & Co.**, to deliver certain flour, under the following agreement.

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Held, that the contract was not within the statute of frauds, but was sufficiently valid to authorize a recovery in damages thereon, for the breach thereof.

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Linton & Co., vs. Williams.

And upon the hearing of which cause in the City Court of Augusta, the presiding Judge ordered a nonsuit, on the ground, that "the promise proved on the part of the plaintiff, was wholly without consideration, inasmuch, as by the plaintiff's own showing, there was no obligation by him to take the flour contracted for, he having the option to call for it or not, as he thought proper, and only agreeing to pay for what he did call for."

The following evidence was introduced on the part of the plaintiff:

Augustus D. Williams sworn, testified that he made a contract with Linton & Co., for the purchase of one hundred barrels of flour from them, at five dollars and a half per barrel; that he was acting in that behalf as agent for the plaintiff, and was thereunto lawfully authorized; that he agreed with Linton & Co., in behalf of plaintiff, to pay them for the flour according to the custom of merchants in Augusta, that is, on the first of each month, he (the plaintiff) was to pay them for the flour delivered during the month preceding; that thereupon, said Linton & Co. executed and delivered to him, for the plaintiff, the said written instrument; that a short time after, he called on Linton & Co., tendered to them twenty seven dollars and a half in gold, and in the name of the plaintiff, demanded five barrels of flour, in pursuance of said contract, which were refused; that the grade or class of flour specified in said agreement, advanced steadily, and was worth during the next succeeding winter, from seven and a half to eight dollars per barrel.

Martin Bridwell sworn, desposed that superfine flour, in the winter of 1853—54, was worth from seven and a half to eight dollars per barrel.

Adrian V. Larock sworn, desposed, that in company with plaintiff, on the 31st January, 1854 he called on defendant, and saw plaintiff tender to him five hundred and fifty dollars in gold, and heard him demand of the defendant the one hun-

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dred barrels of flour, in pursuance of said written contract, which were refused by defendant.

After hearing argument, the Superior Court overruled the decision of the City Court of Augusta, and ordered that the nonsuit should be set aside, and the case be reinstated, and submitted to the jury upon the proofs.

To this decision of the Court, counsel for the said Samuel D. Linton & Co. filed his bill of exceptions, assigning the same as error.

CLAIBORNE SNEAD, for plaintiff in error.

MILLERS & JACKSON, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The return to the *certiorari* shows, that on the 7th day of September, 1853, a negotiation, for the sale and purchase of flour, was entered into by the parties, through their respective agents, which resulted in the delivery to the plaintiff, by the defendant, of the following note of sale:

C. A. WILLIAMS,

To S. D. LINTON & CO. Dr.

To 100 barrels Sup. Flour, at \$5.50, - - \$550.00
to be delivered at any time during the winter when wanted,
from this date. Augusta, Sept., '53.

S. D. LINTON & CO.,

Per MEAD.

That on the 31st of January, 1854, plaintiffs called on defendants and tendered in gold, the full amount of \$550, and demanded the 100 barrels of flour, which were refused to be delivered. To recover damages, for a failure or refusal to perform their contract, this action is brought against the defendants; and at the trial, the above facts were presented to the jury, with the additional proof of the value of flour at Augusta, in the winter of 1853—54. The City Court held,

Linton & Co. vs. Williams.

that the evidence was insufficient to entitle the plaintiff to a verdict, who was, on motion of counsel for defendants, compelled to submit to a nonsuit. Was this a nude pact, and were not the defendants bound by their contract? Judge Holt reversed the decision of the Court below. He delivered the following opinion:

"This Court cannot perceive how a contract, for the sale of one hundred barrels of flour, for five hundred and fifty dollars, can, with much propriety, be called a void agreement. The commodity and the price are both fully stated. It was certainly within the power of the contracting parties to stipulate the time of delivery; and this they have done with sufficient certainty. The plaintiff might, by the terms of the note or memorandum, postpone the delivery to the end of the winter. He must then receive and pay. Neither party had the power to repudiate. If both parties had signed this paper, it might have seemed plainer, that both were bound by it. But the liability of neither would have been thereby increased. One signed, and the other accepted it. And there is in it a perfect mutuality of undertakings."

In confirmation of Judge Holt's opinion, we would add, that it is laid down by Mr. Greenleaf, that it is not necessary that the agreement or memorandum, to be binding, should be signed by both parties, or that both be legally bound to the performance; for the statute only requires that it be signed by the party to be charged therewith; that is, by the defendants, against whom the performance or damages are demanded. *Greenleaf on Ev.* 1 vol. sec. 268. And in support of this proposition, he cites the case of *Allen vs. Bennett*, 3 Taunton, 169; *Shirley vs. Shirley*, 7 Blackford, 452; *Davis vs. Shields*, 26 Wendell, 341; which fully sustain the doctrine.

Chancellor Kent maintains the same position. He says, the signing of the agreement by one party only, is sufficient, and it be the party sought to be charged. For he is estopped by his signature from denying, that the contract was

validly executed, though the paper be not signed by the other party, who sues for a performance. 3 *Kent's Com.* 510, and cases there cited. And Lord Manners, in 2 *Ball & Beatty*, 370; Sir William Grant, in 3 *Ves. and Beam.* 192; Sir William Plummer in 2 *Jac. and Walk.* 426; *Ballard vs. Walker*, 3 *Johns. Cas.* 60; *Selon vs. Slade*, *ib.* 265; *Clayson vs. Bailey*, 14 *Johns.* 487; *Douglass vs. Stears*, 2 *Nott & McCord*, 207; *Palmer vs. Scott*, 1 *Russ. and Milne*, 391; *Champion vs. Plunar*, 1 *New Rep.* 252; *Egerton vs. Matthews*, 6 *East.* 307; and *Sanderson vs. Jackson*, 2 *Boss. & Pull.* 238; *Ross on Contracts*, 85; 2 *Boss. & Pull.* 447; 1 *East.* 203; 23 *Pickering*, 400; 2 *Hall*, 405; 4 *Iredell*, 257; 3 *Humphrey*, 19; 5 *Ga. Rep.* 171; and 1 *Kelly*, 220, are all authorities to the same point.

In this case the contract is full and complete. All the terms of it can be collected from the writing. The name of Williams does appear in it. True, it is put there by the defendants, but Williams, by accepting the contract, as thus written, ratifies the use of his name. Under these circumstances, the signature, in writing, by Linton, thereby binding himself, is a good consideration for the promise on the part of Williams, to pay the price stipulated for the flour. He might call for it at any time during the winter. He was bound to receive the flour, and pay for it, by the end of the winter.

We hold, therefore, that there was not only a sufficient consideration for the promise, but that the contract, as executed, was not within the statute of frauds.

In *Allen vs. Bennett*, it was said by one of the Judges that the statute was chiefly made for the benefit of buyers.

Judgment affirmed.

Whilden vs. The State.

JOHN B. WHILDEN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] There was a fight between two persons. They were separated. Thirty minutes afterwards, whilst one of them was undergoing an examination, as to his wounds, with his pantaloons down, he was attacked by the other.

Held, that the two fights were distinct, and that the first made no part of the second, and therefore, that on an indictment for the second, evidence of the first was not admissible,

[2.] On an indictment for stabbing, the jury may find a verdict of guilty of an assault and battery.

Indictment for stabbing, from Burke County. Tried before Judge HOLT, April Term, 1858.

John B. Whilden was indicted in the Court below for stabbing A. Floyd.

Upon the trial the Attorney General, on the part of the State, offered as a witness,

A. Floyd, the prosecutor, who testified, that on the 18th of July, 1856, defendant came up to him (witness) with a stick in one hand and a knife in the other, and made an assault upon him by striking him with the stick and cutting him in two places with the knife—one on the right arm, about 3 inches wide, and a quarter deep, and a slight wound on the left arm. The parties had had a previous difficulty on that day, about 30 minutes before, or a short time, not certain as to the length of time; the parties had not cooled; witness was still excited; had been separated. When defendant made second attack, witness' wounds were being examined by Mills H. Brinson; witness' pantaloons were down for that purpose.

Upon cross examination of witness, defendant's attorney asked "whether prosecutor did not stab defendant in the first difficulty." To which the Attorney General, on the part of the State, objected, on the ground that it related to a distinct and separate transaction, disconnected with the case at bar. The Court sustained the objection, and defendant excepted.

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Defendant's counsel then asked "what occurred between the parties in the first difficulty." The State objected, and the Court sustained the objection, and defendant excepted.

Mills H. Brinson testified, that he saw the difficulty between the parties. At the time of the second difficulty he (witness) was standing near Floyd, examining the wounds upon him: Floyd's pantaloons were down for that purpose. Defendant came up and struck Floyd with a stick. As defendant came up, witness saw blood upon his stomach; looked fresh. The time between the first and second difficulties was short, from 20 to 30 minutes. He (witness) cannot be precise as to the time.

Upon cross examination, defendant's counsel asked witness "what occurred between the parties in the first difficulty." To this the Attorney General objected on the same ground as before. The Court sustained the objection, and defendant's counsel excepted.

The case being closed, defendant's counsel asked the Court to charge "that if they believed the defendant guilty of stabbing the said Floyd, there could be no conviction for assault and battery."

The Court refused so to charge, but charged the jury "that the Attorney General might waive the felony, and that the jury might find defendant guilty of assault and battery."

To this charge the defendant's counsel excepted.

The jury found the defendant guilty.

Whereupon defendant's counsel filed his bill of exceptions, saying that the Court erred:

In disallowing the question by defendant's counsel, "whether prosecutor did not stab the defendant in the first difficulty?"

Also, in disallowing the question, "what occurred between the parties in the first difficulty?"

Also, in disallowing the question to the second witness, "What occurred between the parties in the first difficulty?"

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In refusing to charge the jury as requested by defendant's counsel, and in charging the jury "that the Attorney General might waive the felony, and that the jury might find defendant guilty of assault and battery."

SHEWMAKE; and A. H. H. DAWSON, for plaintiff in error.

McLAW (Attorney General) and JONES & STURGES, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The first question is, was the Court below right in rejecting the testimony offered as to the *first* fight.

The indictment was founded on the *second* fight.

Unless the first fight made a part of the second; that is, unless it was a part of the *res gestae*, it is clear, that evidence of it, was not admissible. If not a part of the *res gestae*, the first fight could not possibly constitute a defence in a case founded on the second.

Did the first fight make a part of the second?

The Judge certifies, "that both witnesses distinctly stated the interval between the first and second fights, to be half an hour."

The parties had been "separated."

Floyd, the party assaulted in the last fight, was at the time of that assault, with his pantaloons down, undergoing an examination of the wounds received by him in the first fight.

[1.] These being the facts, we think, that the second fight was a new fight, making no part of the first.

Consequently, we think, that the Court was right in excluding evidence of the first fight.

The indictment was for stabbing. On such an indictment, were the jury at liberty to find a verdict of guilty of an assault and battery? The Court told the jury that they were. This is the only other question.

It is laid down by Lord Hale as a general principle, tha,

the jury "may find the defendant guilty of part and not guilty of the rest." 2 *Hale's Pleas of the Crown*, 302.

One of his examples is this; "if a man be indicted upon the statute of 1 *Jac.* of stabbing *contra formam statuti.*, the jury may acquit him upon the statute, and find him guilty of manslaughter at common law." *Id. Ibid.*

There can be no doubt, that the general principle laid down by Lord Hale is true.

It is every day's occurrence for the jury, on an indictment for murder, to find the defendant guilty of any species of manslaughter—even the slightest, and that species does not amount to a felony.

Does the principle apply here?

Every case of stabbing includes the case of an assault and battery; that is to say, an assault and battery makes a part of every case of stabbing.

Why then should not the principle apply to the case of stabbing?

Because, as it is said, the judgment for the assault and battery, would not be a bar to another indictment for the stabbing.

[2.] But we think it would. It would show the party already convicted of a part of that which would go to make up the whole case of stabbing, namely, the assault and battery part, and that case deprived of this part, would really cease to be a case of stabbing; for there cannot be a case of stabbing, that does not include an assault and battery.

Besides, this argument lies equally in the cases in which, beyond question, it is true, that on an indictment for the greater offence, there may be a verdict for the lesser.

It was also argued, that the Solicitor General has no right, on an indictment for stabbing, to elect to have the defendant tried for an assault and battery only; and the reason given was, that, thus, the defendant would suffer in the number of his peremptory challenges.

But, in the first place, the record does not show, that the

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Solicitor General made any such election as this : in the next, though it may be true, that the defendant would lose in respect to his peremptory challenges, yet, it is also true, that, in other respects, he would gain far more than a compensation ; he would gain exemption from the chance of being punished as a felon in the Penitentiary.

[3.] We think, then, that the principle applies in this case ; and, so thinking, we have to affirm the judgment.

Judgment affirmed.



JAMES B. HAYNE, et al., plaintiffs in error, vs. JOSEPH M. PERRY, to the use of, &c., defendant in error.

A suit brought in the name of a person to whom a note not negotiable has been passed, may be amended by inserting the name of the payee for the use of such person.

Assumpsit, from Burke county. Decided by Judge HOLT, April Term, 1858.

This was a motion by the plaintiff's counsel, to amend the declaration and process in a cause wherein Thomas H. Blount and Edward H. Blount, partners under the name, firm and style of T. H. & E. H. Blount, endorsees, were plaintiffs, and James B. Hayne, principal, and Robert J. D. Roberts, security, were defendants ; being an action of assumpsit, founded upon a note in the following words, to-wit :

§75. Thirty days after date, I promise to pay J. M. Perry, seventy-five dollars, for one land warrant of 40 acres, and one of 120 acres, this 6th day of Nov., 1855.

J. B. HAYNE,

R. J. D. ROBERTS, Security."

and which was endorsed on the back "Jos. M. Perry".

The counsel in said cause for plaintiffs moved for leave to amend the declaration, it being the appearance Term thereof, by inserting at the beginning the words "Joseph M. Perry, who sues for the use of," and the word "security" after the words Robert J. D. Roberts in the process, and by striking out the words "and your petitioners aver, that on the day and year last aforesaid, the said note was endorsed to them by the said Joseph M. Perry, for a valuable consideration."

The defendants, by their counsel, resisted the motion, contending that the first amendment would be a change of the parties plaintiff, but the Court overruled the objections of the defendants, and sustained the motion to amend, and ordered the said amendments.

To this decision of the Court, plaintiffs in error filed their bill of exceptions, assigning the same for error.

SNEAD, for plaintiff in error.

BERRIEN ; JONES & JENKINS, *contra*.

By the Court—McDONALD, J. delivering the opinion.

The motion to amend was made at the appearance Term of the cause. The defendant, therefore, appearing by attorney to resist the motion, had notice of it at the answering Term of the Court, in ample time to file his defence, and to prepare his proofs to sustain it. But if there had been any peculiar circumstance connected with the defence, making it necessary to the defendant to have the full benefit of the seventeen days before Court, the time fixed by law, for his service, to prepare his pleas or his answer, and if that fact had been made to appear satisfactorily to the presiding Judge, the cause would, no doubt, have been continued, so as to have allowed the defendant until the succeeding Term to answer, thus making that the appearance Term of the cause. If a motion to amend be made by either party at the trial Term

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of a cause, and if the matter in regard to which the amendment is asked be something material, and the Court allow it, the opposite party has it in his power to compel the amending party to continue the cause. In that event, the party opposing the amendment, has more time to prepare his proofs for the trial, than if the pleadings had been originally perfect. He cannot be prejudiced.

But it is argued, that inasmuch as the amendment in this case was to substitute a plaintiff for the one in whose name the suit was brought, it will make a new case, which is not admissible. The same argument may be urged against every amendment; for a declaration or plea, after amendment, is not identical with it before amendment. In this case the action brought is *assumpsit*. That is the proper form of action, and may be sustained on the note sued on, whether the suit be in the name of the payee, or, if it had been negotiable, in the name of an indorsee.

The note sued on in the declaration is set out. The names of the makers and of the payee are stated; and the amount of the note, the consideration, and the time when payable, are set forth. The entire beneficial interest in the note sued on must be presumed to be in the parties in whose names the suit was originally brought. The payee, by negotiating it, gave the persons to whom he passed it, impliedly, irrevocable authority to sue in his name, if a suit should be necessary to its collection. We think that our statutes of amendment are broad enough to allow of this amendment. *Cobb*, 484, 486, 493.

In England, the rule is, that "in all cases of contracts, if it appear upon the face of the pleadings, that there are other obligees, covenantees or parties to the contract, who ought to be, but are not, joined as plaintiffs in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error." *1st Chitty's Pleadings*, 14. The good sense of this rule in England has been questioned, and although it is a grave error there to *misjoin* as well as to *nonjoin* a plaintiff, the

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Court has allowed, in a hard case, a plaintiff's name to be struck from the declaration, in an action of assumpsit, when the statute of limitations would bar a fresh action. *Ib. note x.* By express enactment there can arise no difficulty from the non-joinder of a party plaintiff. *Cobb*, 493.

The amendment under consideration cannot affect injuriously the rights of the defendant. The contract and the parties to the contract are the same, and he has ample time to remodel his defence, if necessary to meet the case in the name of the payee, who has no longer an interest in the contract, and is only a nominal party. This case is within the purpose, meaning and intent of the statutes authorizing amendments to be made, and the judgment of the Court below must be affirmed.

While pronouncing the judgment of the Court, I will take occasion to say, for myself, that according to my judgment, that such cases as that presented in the record, cannot be brought before this Court under the Constitution and law organizing this Court.

Judgment affirmed.

PETER POULET AND WIFE, plaintiffs in error, vs. JACOB JOHNSON and another, defendants in error.

[1.] "The oath of the party, stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody," is a sufficient foundation for the introduction of a second copy of such original.

[2.] Verbal admissions are legal evidence, to prove a trust resulting by implication of law.

[3.] Notice to a purchaser, that a particular person claims title to the thing about to be purchased, is sufficient, notwithstanding that the notice may not give the nature of the claim.

In Equity, from Richmond county. Decided by Judge HOLT, April Term, 1857.

The object of the bill in this case was to obtain possession of a lot, in the city of Augusta, to which the plaintiffs set up claim, and which they allege has been inequitably withheld from them, by the defendants, and to have that full relief, which their case requires, and which a Court of Law cannot give.

It appears that, many years ago, the elder Cleon Nally, father of complainant, owned the lot now in controversy, and died in possession of it; that he was a man of small means, and left his estate incumbered with debt, and left, as his heirs, his widow and two children, one of whom died in infancy; that his widow, who continued to reside on the lot, took administration on his estate, and on the sixth of August, 1822, the lot was sold by the Sheriff of Richmond county, under an execution against Cleon Nally and one Lud Harris, and bid off by Philip H. Mantz; but the possession of the lot was not changed, after the sale, nor any title given by the Sheriff, until the third day of February, 1827, and the deed recorded 14th May; that in the mean time, to-wit: on the 8th day of December, 1824, Mrs. Nally, being about to enter into a marriage with James Johnson, father of the complainant, Jacob, an ante-nuptial contract was entered into, between the said James, and Freeman Walker and Philip H. Mantz, as trustees for Mrs. Nally, by which the said James agreed, upon the marriage being solemnized, to settle and assure to them, the said trustees, above named, their heirs or assigns, for the use of the said Mary Nally, and the heirs, now minors of Cleon Nally, deceased, all the right, title, interest, claim, or demand, which the said James Johnson, may, by the solemnization of the said intended marriage, acquire in any property, real or personal, now belonging to the estate of Cleon Nally, deceased, or to the said Mary Nally, individually: That the marriage was solemnized, and James Johnson and

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Mary, his wife, continued in possession of said lot, residing thereon, until their death in the fall of 1839; and that complainant, Jacob, is the only issue of the marriage. That in 1835 or 6, application being made to Mantz, for the purchase of the lot, he said he could not sell it, as it belonged to Mrs. Johnson; that he had bought the lot, or advanced on it for Mrs. Johnson, and she still owed a small portion of that advance: That after the death of Johnson and wife, to-wit: in November 1839, Mantz rented the lot to a tenant, who wished to occupy it, but that the boys were in possession, and would not give it up: That Mantz told them they had better let it be rented out, and finish paying for it. He said he was their mother's trustee; had bought the lot, when sold for her husband's debts, and she still owed him about \$65 for it: That Mantz was repeatedly heard to admit the lot to be Mrs. Johnson's property: That on the seventh day of May, 1844, the said lot, having been levied on by the Sheriff of the city of Augusta, as the property of Philip H. Mantz, was exposed to public sale, and bought by Mary T. Morrison, the highest bidder, for the sum of \$305: That at that sale, public notice, in behalf of complainants, was given to the bidders, that the lot was not the property of Mantz, but belonged to the orphan children of Mary Johnson, and whoever bought it would buy a law-suit: That the property was at that time worth from \$1,500 to \$2,000; That, on the 13th February, 1846, Mary T. Morrison, for the same consideration, \$305, conveyed the lot to Mary Mantz, widow of Philip H. Mantz: That in the year 1851, Mary Mantz, then Mary Henry, and her trustee, John D. Smith, sold and conveyed the lot to the defendant, Eliza, then Eliza Hackett, who had been informed that Jacob Johnson pretended to make some claim to the property, but was advised and believed the claim to be utterly groundless.

Upon the trial the complainant offered in evidence a copy, certified from the record in the Clerk's office of said Court, of an alleged marriage settlement, or ante-nuptial contract, between James Johnson and Mary Nally, both deceas-

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ed ; which contract was dated, or purported to be dated, on the twenty-eighth of December eighteen hundred and twenty-four, and recorded on the first of February eighteen hundred and forty ; said record being made, some three months after both the parties to said alleged contract had departed this life.

The defendants objected to the admission of said copy in evidence, because, first, no evidence was offered of the existence of any such original paper ; and secondly, if ever in existence, the original was not accounted for. Henry Johnson, half brother of James Johnson, deceased, who had the principal management of this suit, and the litigation preceding it, as next friend of his nephew, Jacob Johnson, one of the complainants, was then sworn : and stated that he never saw the original paper, and never made any particular search for it. That in order to find documents touching this case, he had examined the papers of the deceased James Johnson and wife, and a box of papers, found in the store of John D. Smith, in Augusta, said to belong to Philip H. Mantz, deceased, under whom the defendants claim title, and no such paper was found there. No other evidence was offered of the existence of the original, or by way of accounting for it. The Court admitted the copy to be read in evidence, the defendants objecting.

In the progress of the trial, three witnesses were offered—Garey F. Parish, William Little, William W. Lawrence, to prove the verbal admissions of Philip H. Mantz, in his lifetime, that this property belonged to Mary Johnson. To which defendants' counsel objected, as being inadmissible to show title to real estate. The Court admitted the evidence ; as going to show Mantz's acceptance of the trust, under marriage contract.

The evidence of said Parish and Little, respectively, was objected to by defendants' counsel, on the ground that it proved a title, different from that set up in the bill : for that the bill claimed the property, under the ante-nuptial contract afore-

said, as part of the property of said Mary Nally, at the time of said contract, and the proof was that said Mantz admitted that he had bought the lot, for Mrs. Johnson ; which objection the Court overruled, and admitted the testimony.

The Court charged the jury, that in order to recover, the Complainants must show that the property in question was intended to be included in the marriage contract, and that Mantz had accepted the trust ; but that his acceptance might be shown by his acts and declarations, without writing ; that the complainants' title must be derived, under said contract.

The Court also charged, that if Mantz held the property under the purchase of 1822, in his own right, it could not be included in the ante-nuptial contract ; but if he held it for Mrs. Nally, it was so included.

The Court further charged, that if Eliza Hackett bought the property for value, without notice of any trust in Mantz, she could hold it ; but that a notice of any claim, on the part of the complainants, was sufficient, without showing what was the character of the claim.

Under this charge, the jury found for the complainants.

Defendants counsel thereupon moved for a new trial on the following grounds.

I. Error of the Court, in this :

1st. In admitting in evidence, a copy of the alleged marriage contract of James Johnson, in prospect of his marriage with Mary Nally, without any evidence that the original ever existed, and without accounting for its non-production, if it ever did exist.

2d. In admitting parol evidence of title to real estate.

3d. In admitting Garey F. Parish and William Little, to prove the admission of Philip H. Mantz, under whom the defendants claimed title, made during his possession of the property in dispute, that he Mantz held the property for Mary Johnson ; because the admissions were, that he had bought the lot for Mrs. Johnson, which showed a title, different from

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that set up in the bill, which was a title as *cestui que trust*, in Mantz under the marriage settlement above referred to.

4th. In charging the jury, that if Mantz held the property under the sale of 1822, in trust for Mrs. Nally, the marriage settlement covered it, and it could be recovered in this proceeding.

5th. In charging the jury that a general notice of any claim to the property, on the part of the complainants, brought home to the defendant, then Eliza Hackett, before her purchase, deprived her of the rights of a *bona fide* purchaser for value; although it was no notice of the character of the claim, or of the equity set up in this bill.

II. Error of the jury, in this:

1st. That the verdict was against the charge of the Court, for the Court charged that a *bona fide* purchaser for value cannot be bound, by any secret trust of the person under whom he claims, unless notice of that trust is brought home to such purchaser. And no notice of any such trust was shown. Moreover, the Court charged that to entitle the claimant to a verdict, Mantz must be proven to have accepted the trust, under the marriage contract, and no such acceptance was shown. Moreover, the Court charged, that if Mantz held the property in his own right, under the sale of 1822, it could not be included in the settlement; and the evidence was that he did so hold it.

2d. That the verdict was contrary to the evidence in the case.

The Court below refused the motion for a new trial on all the grounds taken, and counsel for defendants excepted.

GOULD & SNEAD, for plaintiffs in error.

MILLERS & JACKSON, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right in overruling the motion for a new trial? This is the question.

The first ground of the motion, is in these words:

"I. *Error of the Court*, in this: 1. In admitting in evidence a copy of the alleged marriage contract of James Johnson, in prospect of marriage with Mary Nally, without any evidence that the original ever existed, and without accounting for its non-production, if it ever did exist."

[1.] The fifty second rule of Court is in these words: "Whenever a party wishes to introduce the copy of a deed or other instrument between the parties litigant, in evidence, the oath of the party, stating his belief of the loss or destruction, of the original, and that it is not in his possession, power, or custody, should be a sufficient foundation for the introduction of such secondary evidence."

In the present case, there was a waiver of the "oath of the party"—that is of the oath of Jacob Thompson, he "having been an infant, during most of the transactions."

This waiver of itself, must be considered as an admission, that he, if sworn, would have made the oath contemplated by the rule of Court.

The copy offered in evidence, was a copy taken from the record. That copy, therefore, was itself, some evidence that an original had existed.

It is true that to the admission of the copy, an objection was taken in *this* Court, that the instrument was not one entitled to record. But it is possible, that if this objection had been taken in the Court below, it might have been obviated in some mode; as, by the introduction of witnesses to the execution of the instrument. The objection, therefore, if otherwise good, came too late. *Harrison vs. Young*, 9, *Ga. R.* 359.

The common law is satisfied with "slight evidence" of the existence of the original writing, when secondary evidence of the execution of the writing is offered. 1 *Green. Ev. sec.* 558; 6 *Ga.* 194.

And ought not this to be so, as, it is the very object of the secondary evidence itself, to prove the execution, that is,

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the *existence* of the original writing. When the showing is sufficient to satisfy the Court, that the party is not holding back primary evidence, the showing it would seem, ought to be considered sufficient to admit the secondary evidence.

We think, then, that there was, in what has been referred to, sufficient evidence, that the original had "*existed*;" and, perhaps, also, a sufficient "accounting for its non-production."

There was however on the last point, further evidence, namely, the evidence of Henry Johnson, who had been the guardian *ad litem* in the case, for Jacob Johnson, before the latter became twenty-one years old. This evidence was, that though he had never seen the original, or "made any particular search" for it, "specially," yet, that he "had examined, (to find documents touching" the case,) "the papers of James Johnson and wife, deceased, and, a box of papers, found in the store of J. D. Smith, in Augusta, said to belong to P. H. Mantz;" and "that no such paper was found, in either place." Mantz was dead; his wife had again married, and had remove from the State—having, previously to the marriage, made a marriage settlement, in which Smith was her trustee. It did not appear, that there was any representative of Mantz's estate. Under these circumstances, no further search was required. Henry Johnson had searched in every place in which, it was to be expected, that the paper might be found.

We think, then, the first ground of the motion, not sufficient.

The second ground of the motion, is in these words, "in admitting parol evidence of title to real estate."

The evidence here referred to, was the evidence of *Parish, Little and Lawrence*. We may take *Little's*, as a sample. It was as follows—"rented the lot of Mantz in November 1839, soon after Johnson's death. The boys were in possession, and would not give it up, Mantz told them, they had better let it be rented out, and finish paying for it. He said, he was their mother's trustee: had brought the lot, when sold

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for her husband's debts, and she still owed him sixty-five dollars for it. Witness did not understand which husband he meant." There was evidence to show the lot to have been sold, for the first husband's debts, in 1822, and bought by Mantz; none, to show, that it had ever been sold for the last husband's debts. It may be presumed, that this renting of the lot by *Little*, finished paying Mantz for it.

Taking the above things to be true, they show that a trust in the lot *resulted by implication of law*, to Mrs. Nally, a trust in which, Mantz was the trustee; She the *cestui que trust*.

But trusts resulting by implication of law, are expressly excepted from the part of the statute of frauds, which requires "all declarations or creations of trusts," to be "manifested and proved by some writing."

[2.] Such trusts, therefore, may still be manifested and proved, by matter not in writing.

We think, then, that there was nothing in the second ground of the motion.

The third ground of the motion, consisted also, in an objection to this same evidence of these same three witnesses, but an objection founded on a different reason; viz, the reason, that the admissions of Mantz, "showed," as it was insisted, "a title different from that set up in the bill, which was a title, as *cestui que trust* of Mantz, under the marriage settlement."

The title set up in the bill, was a title under the marriage articles. Those were dated in 1824. By them, Johnson, the husband they contemplated, agreed to settle on trustees for Mrs. Nally, the wife they contemplated, and for her two children, "all the right, title, interest, claim, or demand, which the said James Johnson" might, "by the solemnization of said intended marriage, acquire in any property, real or personal," then "belonging to the estate of Cleon Nally, deceased, or to said Mary Nally individually."

Now the admissions of Mantz, showed a resulting trust in Mrs. Mary Nally, commencing in 1822; for the buying of

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the lot for her by him, happened in that year. The admissions, then, showed, that this trust was a part of Mrs. Nally's "right, title, interest, claim or demand," *covered by the articles.*

The admissions, "therefore went to prove the very title set up by the bill; they went to prove that the lot was a part of the property had in contemplation by the articles, which themselves failed to specify what particular property they did have in contemplation.

It is true, that the admissions might also serve to show, an independent trust in Mantz, one that would exist if there had been no articles at all, but yet, this does not prove, that they could not show, that that trust was intended to be one of the things contemplated by the articles.

This third ground, then, is we think, not true in point of fact.

The fourth ground merely presents this same question, in another form.

The Court charged the jury, "that a notice" (to Eliza Hackett) "of any claim on the part of the complainants, was sufficient, without showing what was the character of the claim."

This charge is made the fifth ground of the motion.

[3.] The charge, we think, was right. Such a notice was sufficient to require Miss Hackett to enquire of the *complainants* what was the nature of their title. And any notice requiring that of a purchaser, is a good notice. 1 *Stor. Eq. sec.* 400.

The next ground of the motion, was this; "that the verdict was against the charge of the Court, for the Court charged, that a *bona fide* purchaser for value, cannot be bound by any secret trust of the person under whom he claims, unless notice of that trust is brought home to such purchaser. And no notice of any such trust was shown. Moreover, the Court charged, that to entitle the claimant to a verdict, Mantz must be proven to have accepted the trust under the marriage con-

tract, and no such acceptance was shown. Moreover, the Court charged, that if Mantz held the property in his own right, under the sale of 1822, it could not be included in the settlement; and the evidence was, that he did so hold it."

As to the first of these three specifications.

It is not true, that "no notice of any such trust was shown." The answer admits, that Miss Hackett "had been informed that Jacob Johnson pretended to make some claim to the property." True, the answer also says, that she "was advised and believed it to be utterly groundless." But why did she not enquire of Jacob Johnson? He could have told her better, and he, of all persons, was the one to enquire of.

Then, Parish told her "the title was doubtful. She answered, that William T. Gould had advised her the title was good." This may mean, that she knew what Johnson's title was, and that, having legal advice on it, she considered it worthless.

Then, the property continued in the possession of Mr. & Mrs. Johnson, from their marriage in 1824, to their death in 1839. It was never in the possession of P. H. Mantz, except as Mrs. Johnson's *administrator*. The slightest enquiry by Miss. Hackett of Jacob Johnson in reference to his claim, would, probably, have put her in possession of this great fact.

As to the second of these specifications.

There *was* evidence going to show, that Mantz had "accepted the trust under the marriage contract." Little heard him tell "the boys," (the complaints,) that "he was their mother's trustee." What did he mean by this? That he was trustee by the *resulting trust* aforesaid, or trustee by the *marriage articles*? The jury might well infer, that he meant the latter, not being a lawyer, is it likely, that he ever knew, that there was such a thing as a resulting trust.

As to the last of these specifications.

It is not true, as we think, that the evidence was, that Mantz held the property in his own right. The evidence,

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as we think, shows that Mantz held the property in trust for Mrs. Johnson and her two Nally children, a trust resulting by implication of law, from his having purchased the property for her, and having been reimbursed by her, the money paid out by him in the purchase.

The last ground of the motion, was, that the verdict was contrary to the evidence.

We think, that the verdict was not contrary to the evidence.

The result is, that we think, the judgment right, overruling the motion for a new trial.

Judgment affirmed.

In the matter of the annual return of JOHN J. JONES, executor, of Seaborn A. Jones, deceased, on commission, &c.

An executor of an executor is entitled to commissions on pecuniary legacies paid out under the will of the first testator, commissions to be retained out of the fund due to the legatees; but he is not entitled to commissions from the estate of his immediate testator, on the hypothesis that the amount was due as a debt from his estate to the former estate, unless it appears that the last testator claimed the fund adversely to the legatees, under the first will. That the money and notes of the two estates were so commingled, that they could not be distinguished, makes no odds, if the deceased executor had charged himself with them, which he must be presumed to have done, if the contrary does not appear.

Appeal from Burke county. Decided by Judge Holt, May Term, 1858.

This cause (which was an *ex parte* proceeding,) came up upon the following circumstances:

Abraham Jones dies testate, leaving his property to A. B.

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& C., appoints Seaborn Augustus Jones, executor. He qualifies as executor. Divides all the property under the will of said Abraham, between A. B. & C., except the money, and dies before he pays over to A. B. & C. the money due them. Said Seaborn Augustus at his death, leaves a will appointing John J. Jones and others, executors. Upon examination by J. J. Jones, executor, he finds that his testator S. A. Jones, had so mingled the assets of said Abraham, deceased, with his own, that the money and notes of said Abraham could not be identified. J. J. Jones, executor, in his inventory and schedule, returns all the notes and money found in the possession of the said Seaborn A. at his death to the Ordinary, as the property of the said Seaborn A. Upon a regular statement made up (from reliable data,) it is found that the estate of S. A. Jones owes the estate of Abraham Jones the sum of \$39,788 64, which was the amount due A. B. & C. under the will of the said Abraham and which had not been turned over to them by S. A. Jones, executor, before his death. J. J. Jones, who by law is executor of Abraham Jones, paid off said sum of \$39,788 64 to A. B. & C., less two and a half per cent. commission on the same. J. J. Jones when he comes to make his annual return, makes two returns, one on the estate of Abraham Jones in which he reserves the two and a half per cent. commissions on the \$39,788 64 paid to A. B. & C. Also one on the estate of S. A. Jones, in which he charges the estate of S. A. Jones two and a half per cent. commission for paying out this amount (\$39,788 64) to A. B. & C. for the estate of Abraham Jones; inasmuch as it is a debt, due from the estate of S. A. Jones to the estate of Abraham Jones, and stands on the same footing as any other debt due by said S. A. Jones at the time of his death. At the October Term, 1857, of the Court of Ordinary of Burke county, (being the first Court held after filing of said returns,) J. J. Jones executor, moved an order before said Ordinary "confirming said annual returns as correct and making them the judgment of the Court" (a

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copy of which order will appear in the transcript of the record of this cause.)

The Ordinary refused to grant this order on the ground that said executor was not entitled to charge the estate of S. A. Jones two and a half per cent. commission, for paying the estate of Abraham Jones the \$39,788 64, for the purpose of settling off with A. B. & C. as he had reserved commission on said amount, in paying off A. B. & C. From which decision said executor takes an appeal. His Honor Judge Holt, after hearing argument upon the foregoing statement of facts, sustained the decision of the Ordinary and passed the following order:

"On hearing argument, this Court affirms the judgment of the Ordinary and dismisses the appeal. Let the order be certified to the Court of Ordinary and the case remanded;" and the executor by his counsel excepted.

The presiding Judge of the Court below certified the bill of exceptions, with the following note:

"But as this case was heard *ex parte* and will probably be so presented to the Supreme Court, it is proper to add, that it was stated, that Seaborn A. Jones had been allowed as the executor of Abraham Jones, two and a half per cent. commissions for receiving this same fund, for the paying out of which John J. Jones, as the executor of Abraham Jones, charged and was allowed two and a half per cent. commissions. The Court therefore held, that it never was a part of the estate of Seaborn A. Jones, and that no irregularity of accounts, commingling of assets or return of the executor of Seaborn A. Jones could make it such. That it was not a debt due from Seaborn A. Jones to the estate of Abraham Jones, but assets of his estate in the hands of his executor, and that John Jones held precisely the same relation to the estate of Abraham Jones, that Seaborn A. Jones had held.

11th May, 1858.

(Signed,)

WM. W. HOLT, Judge."

JONES & STURGES, appeared for the executor.

By the Court.—McDONALD, J. delivering the opinion.

The plaintiff in error claims two and a half per centum commissions on the sum of 39,788 64-100 paid by him to certain legatees, under the will of Abraham Jones, of which he became executor by operation of law, Seaborn Augustus Jones, the executor of Abraham Jones' will, having appointed him executor of his will. He had retained two and a half per centum on this same sum, as an amount due him by the legatees under the will of Abraham Jones, as commissions, for paying to them their money under that will. These commissions did not diminish the estate of Abraham Jones, for it was retained from the amount of the legacies, and reduced them by that amount. He now claims two and a half per centum commissions on the same sum, as a debt due by the estate of Seaborn Augustus Jones, to the estate of Abraham Jones. Was it a *debt*, or was the amount a trust fund in the hands of S. A. Jones, to be held under the will of which he was executor, to be paid out whenever the persons to whom it belonged had a right to demand its payment? If the former the plaintiff in error is entitled to the commissions; if the latter he is not. If Seaborn Augustus Jones admitted the trust, and did not claim the fund as his own, in hostility to the legatees under the will of Abraham Jones, or refused to pay when he ought to have paid, he was not an individual debtor, nor a trustee guilty of a breach of trust. He was not a debtor at the time of his death to the estate of Abraham Jones, according to this record. It does not so appear in the record. It seems that there were reliable data from which a regular statement of the amount due the legatees under Abraham Jones' will, from funds in the hands of his executor S. A. Jones, could be made up, and that it was made up, and the amount was paid directly to the legatees. It does not appear in the record what these data were. If Seaborn Augustus Jones made regular returns to the Ordi-

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nary of his actings and doings as executor of the will of Abraham Jones, charging himself with the entire estate which came to his hands and crediting himself with all disbursements, which must be presumed, as the contrary does not appear, those returns must have been the reliable data referred to, and perhaps the only reliable data which would *fully* justify the plaintiff in error, as the executor of Seaborn Augustus Jones' will, in paying that sum to the legatees under Abraham Jones' will; and that payment when made by him and returned to the Ordinary, would pass as a credit of the estate of Seaborn A. Jones, on *his* returns as executor of Abraham Jones, and not as a charge against his executor, the plaintiff in error. The record shows that the plaintiff in error paid the money directly to the legatees under the will of Abraham Jones, and that for that payment he retained the lawful commissions in his returns as executor of Abraham Jones.

His executorship of Abraham Jones' will, was but a continuation of the executorship of his immediate testator, and all disbursements made by him on account of that estate, went to the credit of the executorship of Seaborn A. Jones. But the plaintiff in error claims that he is entitled to commissions, from Seaborn Augustus Jones' assets, because the money and notes of the estates were so mingled together that he could not distinguish them, and on that account he returned them all as the property of Seaborn Augustus Jones, and that the amount due to the legatees of Abraham Jones, became a debt from the estate of S. A. Jones to that of Abraham Jones. That does not necessarily follow, but conceding it, then the plaintiff in error, to entitle himself to commissions, must have paid that debt, and charged himself as executor of Abraham Jones, with the amount. He did not do that, or, if he did, it does not appear in the record. The payment of the legatees was direct to them from assets found, in the possession of Seaborn Augustus Jones, and it enured as a credit, to the benefit of the estate of Seaborn Augustus

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Jones, as a disbursement of effects with which he had charged himself as executor. It does not appear that the plaintiff in error had charged himself with any thing as executor of the will of Abraham Jones. If he be not so charged, there can be no evidence of record of the payment of the money to him as executor of Abraham Jones' will, and without such evidence, he is not entitled to commissions. It is not necessary, though perhaps it is best, for an executor or administrator, to keep the money and notes of his testator or intestate separate from his own. If he charges himself honestly, with everything which comes to his hands, he is bound to account for all, in whatever manner kept by him, and in case of his death, his executor cannot charge commissions against his estate as for a debt, for turning or paying over the amount thus in his hands, when it is not disputed but the amount was in his hands as a trust fund.

If an executor charge himself with money and assets, in his returns, and he die in possession of money and assets, the money and assets must be presumed to be the money and assets of the estate of which he was executor, to the extent to which he has charged himself.

If the plaintiff in error felt bound to embrace in his inventory and schedule all the money and notes found in the possession of Seaborn Augustus Jones at the time of his death, as the money and notes of the said Seaborn Augustus Jones, it was unquestionably a good discharge to pay to the legatees under Abraham Jones' will, money and notes, to the extent to which his testator had charged himself as executor of that estate.

If that be so, there was no necessity for considering the amount as a debt due to the estate of Abraham Jones. It might, with much propriety be considered, as a debt due to the *cestui que trusts*.

The judgment of the Court below must be affirmed.

Judgment affirmed.

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WILLIAM W. WALKER, et al., plaintiffs in error, vs. MOSES WALKER, et al., ex'ors, &c., defendants in error.

MOSES WALKER, et al., ex'ors., &c., plaintiffs in error, vs. WILLIAM W. WALKER, et al., defendants in error.

[1.] F. J. Walker, by the 2d item of his will, directed his executors to send to the Colony in Liberia, in Africa, at the expense of his estate, certain slaves therein named. By the 4th item of the will, the executors were authorized, without any order from any Court, to sell at public or private sale, for cash or on credit, in their discretion, any and all of testator's property, real and personal, and any or all of his slaves, except those specially directed to be colonized, in order to carry out testator's wishes. And by the 5th item of the will, the entire proceeds of the estate is to be invested in such manner as the executors may see fit, and transferred to the American Colonization Society, to be held by them in trust for the maintenance and support of the seven slaves specified and their descendants.

Held, that the trust created by this will in favor of the slaves to be colonized in Africa, was valid; but one which could not be executed by the American Colonization Society under their charter.

[2.] The trust being legal, and the *cestui que trusts* capable of taking, the Chancellor will appoint the executors, or some other fit and proper persons, to carry the trust into effect.

Caveat, from Burke county. Decided by Judge HOLT, April Term, 1858.

Ordered, by consent of counsel, that these two cases be consolidated and argued together.

Francis J. Walker departed this life in 1856, having made his last will and testament as follows :

In the name of God amen : I, *Francis J. Walker*, of the county of Burke and State of Georgia, being of feeble health, but of sound and disposing mind and memory, do make and publish this my *last will and testament*, revoking all others:

IMPRIMIS. I desire all my just debts and funeral expenses to be paid.

ITEM. I direct my executors hereinafter named, or their successors in the administration of my estate, to send to the

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colony of Liberia, in Africa, at the expense of my estate, the following named slaves, belonging to me, viz: Louisa (mulatto) and her children, Green, William and Elizabeth; Louisa (light negro) and her children, Catharine and Augustus, Sue and her son Harry; and Cecilia and her daughter Emily.

ITEM. I authorize my executors, in their discretion, to send to Liberia aforesaid, any and all my slaves not above named, which authority I expect them to exercise or not, as they may or may not ascertain the balance of my estate to be sufficient for the provision hereinafter made for the children above named.

ITEM. I authorize my executors, without any order from any Court, to sell at public or private sale, for cash or on credit, in their discretion, any and all my property, real and personal, and any and all of my slaves, except those specially named above, which they may think it best to sell, in order to carry out my wishes in this will expressed.

ITEM. I direct my executors or their successors in administration, to invest the entire proceeds of my estate, after the payment of my debts and the expenses herein before provided for, in such manner as they may deem most advantageous; and to transfer the whole of it to the *American Colonization Society*, to be held by them in trust for the maintenance and support of the children named in the second clause above, to-wit: Green, William, Elizabeth, Catharine, Augustus, Harry and Emily, and their descendants.

FINALLY. I appoint my brother *Moses Walker* and my friend *Edward B. Gresham*, executors of this my last will and testament.

In witness whereof I have hereunto set my hand and seal this sixteenth day of May, eighteen hundred and fifty-six.

Signed, sealed, published and declared by Francis J. Walker as his last will and testament.

F. J. WALKER [SEAL.]

In presence of W. J. JONES, SAM'L B. CLARK, E. T. MURPHY.

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This will was admitted to proof in solemn form, and the executors qualified.

William W. Walker gave notice to the executors that at the March term, 1857, of the Court of Ordinary, they would be required to prove the will in solemn form, and at the said term the said William W. Walker entered his caveat against the proof of the said will on the following grounds:

(The 1st, 2d, 3d and 4th grounds having been withdrawn, are omitted.)

5th. For that also, the paper presented, as the will of the said Francis J. Walker, is not the will of the deceased, and is not as such entitled to probate.

1st. Because it is in violation of the statutes against the manumission of slaves; in that in and by said pretended will the said Francis J. Walker, both directly and indirectly, attempts to confer freedom on slaves.

2d. Because in and by said pretended will, the said Francis J. Walker attempts to invest the executors named with an illegal, discretionary authority, by which they might confer freedom on slaves.

3d. Because in and by said pretended will, the said Francis J. Walker, contrary to law and the policy of the law, attempted to give to the executors named a discretion and authority in the management of his estate above and uncontrollable by any legal authority.

4th. Because that in and by said pretended will, the said Francis J. Walker attempted to create a trust in a foreign corporation for the benefit of slaves.

And further objecting to said will, the caveators by this amendment to their caveat, say:

1st. That by the fourth and fifth clauses of said will, the testator has sought to create an estate in the American Colonization Society, as trustees for the benefit of the *cestui que trusts* named, which is illegal and invalid, and contrary to

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the laws of this State, in this: That he has sought to create an estate in the nature of an estate tail in perpetuity, for the benefit of said *cestui que trusts*, and therefore said clauses are void and of no effect.

2d. By said clauses he has sought to create an estate in trust, first in his executors, and then in the Colonization Society, for the benefit of persons who are incapable of taking, by reason that they are slaves, and therefore these clauses are void.

3d. These clauses are void, because he has sought to create an estate in the American Colonization Society, as a trustee, which the said Society is incapable of taking, by reason that they are not authorized by their charter to receive such an estate; a copy of which charter, or act of incorporation, by the Legislature of Maryland, being the only charter of said Company, is hereto annexed as a part of this caveat-

"An Act of the Legislature of Maryland, passed March 22d, 1837, entitled 'An Act to incorporate the American Colonization Society.'

"Whereas, by an Act of the General Assembly of Maryland, entitled 'An Act to incorporate the American Colonization Society,' passed at December session, eighteen hundred and thirty-one, chapter one hundred and eighty-nine, the said Society was incorporated with certain powers: And whereas, it is represented to this General Assembly, that the rights and interests of said Society have been materially injured, and are likely to suffer further injury, by certain alleged omissions on the part of said Society, to give efficiency to said Act: Therefore,

"SECTION 1. Be it enacted by the General Assembly of Maryland, That John C. Herbert, Daniel Murray, Joseph Kent, Ezekiel F. Chambers, Daniel Jenifer, George C. Washington, Virgil Maxcy, Zaccheus Collins Lee, Alexander Randall, Francis S. Key, Walter Jones, Ralph R. Gurley and

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William W. Seaton, of the Society called the American Society for Colonizing the free people of color of the United States, and their successors, together with such others elected and qualified, as the present or future Constitution, by-laws, ordinances or regulations of said Society, do or shall hereafter prescribe, shall be, and they are hereby created and declared to be a body politic and corporate, by the name, style and title of The American Colonization Society, and by that name shall have perpetual succession, and shall be able to sue and be sued, to plead and be impleaded, in any Court of law or Equity in this State, and may have and use a common seal, and the same may destroy, alter or renew at pleasure, and shall have power to purchase, have and enjoy, to them and their successors, in fee or otherwise, any lands, tenements, or hereditaments, by the gift, bargain, sale, devise, or other act of any person, or persons, body politic or corporate whatsoever; to take or receive any sum or sums of money goods or chattels that shall be given, sold or bequeathed to them in any manner whatsoever; to occupy, use and enjoy, or sell, transfer or otherwise dispose of, according to the by-laws and ordinances regulating the same, now or hereafter to be prescribed, all such lands, tenements or hereditaments, money, goods or chattels as they shall determine to be most conducive to the colonizing, with their own consent; in Africa, of the free people of color residing in the United States, and for no other uses or purposes whatsoever; and as soon after the passage of this Act as may be convenient, to elect such officers as they or a majority of them present may deem proper, and to make and ordain such Constitution, by-laws, ordinances and regulations as may be necessary for the organization of the said Society; and to repeal, alter or amend the same; to prescribe the times of meeting, the qualifications and terms of membership, and to do all such other acts and deeds as they shall deem necessary for regulating and managing the concerns of the said body corporate; *Provided* *However*, that the Constitution and laws of this State and o

the United States, and this Act of Assembly be not violated thereby.

"SEC. 2. *And be it enacted,* That for the object aforesaid, all property, real, personal and mixed, whether in action or possession, and all rights, credits and demands, owned, held or claimed, before this Act, by the said Society, and all such property, rights, credits and demands, as, were it not for this Act, might hereafter be owned, held or claimed, by the said Society, shall vest and are hereby declared to vest in the said body corporate, and its successors, as fully, and effectually as they have, or could have vested in the said society; and also that the said body corporate and its successors, are hereby declared to be as completely and effectually liable and responsible for all debts, demands and claims, due now or which would thereafter be due by the said Society, if this act of incorporation had not been granted, as the said Society is now, or would hereafter be so liable and responsible for.

"SEC. 3. *And be it enacted,* That the said body corporate, and its successors, shall forever be incapable of holding in fee or less estate, real property in the United States, the yearly value of which exceeds the sum of thirty thousand dollars, or the yearly value of so much thereof as may be in this State, exceeds the sum of five thousand dollars.

"SEC. 4. *And be it enacted,* That the Act hereinbefore mentioned of the General Assembly of Maryland, chapter one hundred and eighty-nine of December session, eighteen hundred and thirty, be, and the same is hereby repealed: *Saving and reserving, however,* to the persons incorporated by said Act, and to the American Colonization Society, all the rights and powers conferred by said Act, so far as the same may be necessary for the recovery, possession, holding or enjoyment of any property, real, personal or mixed, chose in action or franchise of any description whatsoever, which may have been heretofore given, granted, devised or bequeathed to, or otherwise acquired by, the said persons, or any of them, or to or by the American Colonization Society.

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"SEC. 5. And be it enacted, That this Act, and the powers and privileges granted thereby, may be at any time repealed, modified, amended or changed, at the discretion of the General Assembly."

We acknowledge service of the foregoing bill of exceptions, and that it contains a true statement of the case, sufficient for the action of the Supreme Court, and consent that it stand and be taken as well for a transcript for the record, as for the bill of exceptions, and that nothing more be required on the hearing in the Supreme Court.

This caveat was, by consent, appealed to the Court below, and a bill of equity filed, alleging that the 4th and 5th clauses of the will were illegal and invalid for other reasons than those contained in the caveat.

A demurrer was filed to the bill in equity by the executors.

After argument, the Court below made the following order:

"It is therefore ordered that the case be returned to the Court of Ordinary, with instructions to admit the will of Francis J. Walker to record, except the 3d, 4th and 5th clauses thereof, hereby declared to be null, and that an intestacy be declared as to all the property of the said Francis J. Walker, except such parts and so much thereof as are necessary to carry out the provisions contained in the 2d clause of said will. Let the propounders pay costs."

To this order counsel for the caveators excepted, saying that the Court erred:

1st. In deciding that the 2d clause of said will was valid.

2d. In holding that the word "descendants," creating an estate in perpetuity, would vest an absolute estate in the first taker, if capable of taking.

And counsel for propounders tendered their bill of exceptions, saying that the Court erred:

1st. In deciding that the 4th clause of the will is null.

2d. In deciding that the 5th clause of the said will is "null

by reason of the incapacity of the trustees and *cestui que trusts* to take and hold the property therein bequeathed."

3d. In ordering "that the case be returned to the Ordinary with instructions to admit the will of Francis J. Walker to record except the 3d, 4th and 5th clauses thereof, hereby declared to be null, and that an intestacy be declared as to all the property of the said Francis J. Walker, except such parts and so much thereof as are necessary to carry out the provisions contained in the 2d clause of the will." To all which, except so far as the order related to the 2d and 3d clauses, and so much and such parts of the property as were necessary to carry out the provisions contained in the 2d clause of the will, counsel for propounders excepted.

4th. In ordering that "the propounders pay cost."

SNEAD; and STARNES, for caveators.

JENKINS, JONES; and STURGES, for propounders in both cases.

By the Court.—LUMPKIN, J. delivering the opinion.

After argument and consideration, his Honor Judge Holt held, that the second clause in the will of F. J. Walker, providing for the extra-territorial emancipation of a part of the testator's slaves, was valid; and counsel for the caveators excepted. He further decided that the 4th and 5th clauses of the will were void, by reason of the legal incapacity of the trustee and *cestui que trust* to take and hold the property therein bequeathed. And to this ruling counsel for the executors excepted.

Counsel for the caveators having abandoned in open Court, their objections to the decision of the Court, upon the second item in the will, directing the executors to transport the slaves therein named, to Liberia, at the expense of testator's estate, it only remains to examine the 4th and 5th items of the will.

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It is argued that the direction that the proceeds arising from the sale of the balance of the testator's property, should be held in trust for the support and maintenance of the slaves to be colonized in Africa, and their descendants, creates a perpetuity, and that, therefore, the legacy lapsed, and goes to the heirs-at-law.

We hold that this is not a legitimate conclusion. Such is not the meaning of the word "descendants." This term is equivalent to next of kin, or those who would take under the statute of distributions in this State. It means children and grand-children. 3 *Bro. Ch. Cases*, 169. This word was probably used in accommodation to the Act of 1819, (*Cobb*, 995,) which declares that real and personal property belonging to free persons of color, shall remain with such persons and their *descendants*.

But this is wholly immaterial. If decendants mean children, than the children of the legatees would take, as purchasers. If heirs of the body, the seven legatees named in the will, took an absolute estate, under the Act of 1821.

[1.] Can the American Colonization Society execute this trust? We are inclined to think not, under their charter, as expounded by this Court in the case of the *American Colonization Society vs. Lucius J. Gartrell, adm'r, &c.*, 23 *Ga. R.* 448. That society was authorized and empowered to take and receive property, for the purpose of colonizing, with their own consent, in Africa, free people of color residing in the United States, *and for no other uses and purposes whatever*. We will only add here, that a corporation is the creature of the charter which gave it being, and is restricted within the bounds given to it; and has no capacities but those which the charter confers upon it. 2 *Bac. Ab. Title Corporation*, (D.) 9, sec. 12; *Coke*, 120; 3 *Modern*, 14. And a corporation has no right to take and hold property, except in the manner, and for the purposes pointed out by the charter. *Ibid*, E. 3, 13.

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While it may be true, then, that the Colonization Society could not claim the bequest, under the trust, for any other purposes connected with the object so accurately defined in their charter, still, the bequest itself will not of course fail. It is clear, from the will, that the money given for the support and maintenance of the testator's negroes, was not to take effect until they were made free, by being colonized in Liberia. And then, according to all the past adjudications of this Court, they would be capable of taking. *Crawford and others vs. Vance and others*, 4 Ga. Rep. 446; *Cooper vs. Blakey*, 10 Ga. Rep. 263.

In the latter case cited, this Court held, that when a testator, by his will, directed one of his slaves to be removed to a State, in which the law would allow his manumission, and there set free; and also bequeathed the sum of two thousand dollars to said slave, to be invested by a trustee, to be appointed for that purpose for the benefit of such slave, when liberated as directed by said will, the bequest was good. That is this case.

As to the best mode of executing this trust, it will become a matter for the discretion of the Chancellor below. We would suggest the following: 1st. That the executors be appointed trustees in lieu of the Colonization Society, provided they be entirely reliable, and are willing to undertake the office. 2d. That they be instructed to invest the fund in State or municipal corporation bonds, and apply the interest annually, or so much thereof as may be necessary, to the support of the legatees in Liberia during their minority; and to invest the surplus of unused income, (if any,) as an addition to the *corpus* of the estate. 3d. As each male *cestui que trust* arrives at age, let his share be given off to him, and consequently, his interest in the trust cease, except in the event of some one of the children dying in minority, when his distributive share of the portion of such deceased minor, shall be given off to him. So upon the coming of

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age of any female *cestui que trust*, or her marriage, let the same thing be done.

This plan seems to us to have the merit of distinctness, simplicity, and finality of the trust, within a reasonable time.

If it is thought better to order the executors to pay it over at once to the legatees, on their arrival in Liberia, or to authorize them to do it then, or at any future period, at their discretion, it would be lawful to do so. But knowing the thriftless habits of these people, and entertaining as we do, serious apprehensions as to their future, we would greatly prefer the scheme which we have proposed, provided the executors can be induced to embark in it.

Judgment reversed.

MCDONALD J. concurring.

BENNING J. dissenting.

I think this will void under the Acts of 1801 and 1818. My reasons for this opinion, are to be found fully stated in *Sanders vs. Ward*, (Atlanta, Mar. 1858,) and in *Adams vs. Bass*, 18 Ga. 147. To repeat them here is therefore unnecessary.

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ALEX'R R. BEALL, plaintiff in error, vs. STEPHEN DRANE, et al., ex'ors, &c., defendants in error.

STEPHEN DRANE, et al., ex'ors, &c., plaintiffs in error, vs. ALEX'R R. BEALL, defendant in error.

[1.] A free person of color is capable, by the laws of Georgia, of acquiring and holding real estate, except in the cities of Savannah, Augusta and Darien.

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- [2] A bequest in these words: "I reserve the tract of land, &c., for the use of J. A. W., during his natural life, or so much thereof as he can cultivate for his support, and at his death the same to revert back to my estate; but said land shall not be liable for the debts or contracts of the said J. A. W.," is not void for uncertainty.
- [3] The 25th item of the will of Thomas E. Beall was in these words: "It is my will and desire that after my estate shall have been settled up, and all bequests paid out agreeable to the provisions of this my will, the balance of the money or cash remaining in the hands of my executors, shall be invested in an education fund, for the purpose of educating *poor orphan children*, citizens of the county of Columbia, and if the fund should not be absorbed, then the overplus to be applied to the education of the *poor children* of the county of Columbia."

Held, That the bequest was void, on account of the uncertainty as to the persons who were to take under it.

The *poor children* of a county, or congregation, or school, are not susceptible of ascertainment.

Demurrer, from Columbia county. Decided by Judge HOLT, March Term, 1857.

Ordered, by consent of counsel, that the above cases be consolidated and argued together.

This case came up before the Court at the January Term, 1857, the proceedings on which argument, the facts of the case, and the will of the testator, will be found fully reported in 21 *Georgia Reports*, 21.

The case came up under the following circumstances :

Alexander R. Beall, as next of kin to Thomas E. Beall, having obtained letters of administration upon the estate of the said Thomas E. Beall, filed his bill, and after stating the proceedings before referred to, as reported in 21 *Georgia Rep.* 21, set forth the following allegations and statements:

That the ninth clause of said will is illegal and void, and cannot be carried into effect, because it conveys a tract of land to a free person of color, who has not capacity to take and hold lands in our State, and because of uncertainty in the terms of said clause; that the tenth clause is void because of such uncertainty in its terms, and that the twenty-fifth clause is void, because of uncertainty as to the subject of the bequest; and after probate is refused to the clauses of the will which have been declared void, the impossibility of

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arriving at or ascertaining the amount conveyed by said clause; a portion of the fund constituted by the sale of testator's property as directed by the will, out of which certain payments were directed to be made by the clauses which have been declared invalid, and out of which fund the residuary bequest in the said twenty-fifth clause contained, is directed to be taken, now resulting to your orator by reason of the invalidity of said clauses; and that portion being unascertained and unascertainable; and also, because of uncertainty as to the objects of the bequest; the same being to "poor orphans, citizens of Columbia county," and to "poor children of Columbia county," cannot be carried into effect as a portion of the last will and testament of Thomas E. Beall. And the twenty-sixth clause of said will is void because dependent upon the said twenty-fifth clause, and because of indefiniteness and obscurity in the directions given by said testator as to the method in which his intention in this connection was to be or could be carried into effect.

That as next of kin, he has obtained letters of administration upon the estate of the said Thomas E., not disposed of by last will and testament, a copy of which said letters are hereto annexed, and marked Exhibit E; and that as such administrator *de bonis non*, he is entitled to all of the estate of the said Thomas E., which he sought to convey by the clauses of said will that have been declared void, and to which probate has been refused, as well as to the property sought to be conveyed by the said ninth, tenth, twenty-fifth and twenty-sixth clauses of said will, as the same cannot be carried into effect, a part of which property only has been given up by said executors to your orator, to-wit: that disposed of by the twelfth, thirteenth and fifteenth clauses of said will; that as such administrator *de bonis non*, he is entitled to be paid a reasonable hire by said executors for the work and labor of said slaves from the death of the testator to the period when the same were by said executors given up to your orator, to-wit: on the day of in the

year of our Lord eighteen hundred and fifty seven, which said hire amounts to the sum of five thousand dollars, or other large sum; that as such administrator he is also entitled to the stock, farming utensils and other articles, together with the crop of every description, which was on hand at the testator's death, and reserved for the purpose of "stocking" the plantation for the slaves, amounting in value to the sum of two thousand dollars, or other large sum, (the same being disposed of by one of the clauses of said will which has been declared void as aforesaid,) that he is entitled to have and receive from the executors the crop made on the plantation of the testator during the past summer and fall, to-wit; the summer and fall of the year eighteen hundred and fifty six, the same amounting to the sum of five thousand dollars, or other large sum; that he is also entitled to have and receive from said executors that which would be equivalent to the use, enjoyment and cultivation of said plantation, or the actual cultivation thereof by said slaves, for four years, the said use and cultivation of the same for the period aforesaid, having been, by one of the clauses which has been declared void as aforesaid, given to the said slaves, in all amounting to the other and further sum of five thousand dollars; that he is entitled to have and receive from the said executors the sum or sums of money which would have been necessary to remove and used as expenses in removing the said slaves to Liberia, or some free State or Territory, and which were directed to be taken out of his estate and used for this purpose by the testator in certain clauses of his will, which have been declared to be void, as aforesaid, the same amounting in all to the sum of three thousand dollars, or other large sum.

That by the said tenth clause of the said will, a reservation of a tract of land for the use of one James A. Watson for life, was sought to be made by the same testator, that the said James A. is interested, therefore, in the decree which may be made by this honorable Court in deciding upon the valid-

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ity of said clause, wherefore your orator prays, that he may be made a party defendant to this his bill of complaint, if it be deemed necessary. Your orator also sheweth, that by the twenty-sixth clause of said will the testator directs that the Justices of the Inferior Court of said county of Columbia, shall select some person under certain conditions therein specified, to disburse the fund therein directed to be applied to the purposes specified, or that the said Justices, if they can find no one to take charge of the disbursement of the same under the conditions prescribed, shall themselves take charge of the said fund; and if by virtue of said provision the said Justices are interested in the decree which is by this his bill of complaint invoked by your orator, he prays that the said Justices may be made parties defendant to this his bill of complaint.

To this bill the defendants by their solicitor, Charles J. Jenkins, demurred on the grounds,

1st. That there is no equity in said bill, for that the clauses in the last will and testament of Thomas E. Beall sought to be invalidated, are legal, and sufficiently distinct and certain, as well in reference to the subjects as the objects of testamentary disposition, to admit of execution.

2d. That there is no equity in so much and such part of said bill as seeks to invalidate and set aside the 9th clause of said will, making provision for Nancy Goings, a free person of color; for that said clause is legal, valid and capable of execution.

3d. That there is no equity in so much and such part of said bill as seeks to invalidate and set aside the 10th clause of said will, making provision for James A. Watson; for that said 10th clause is legal, valid and capable of execution.

4th. That there is no equity in so much and such parts of said bill as seek to invalidate the 25th and 26th clauses of said last will and testament; for that both the subject matter

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of the devise and the objects of testator's bounty contemplated in said clauses, are clearly ascertainable, and the entire charity legal, wise and beneficent.

5th. That there is no equity in so much or such part of said bill wherein is sought a recovery of hire for the slaves belonging to the estate of the said Thomas E. Beall, during the year 1856, or of the actual proceeds of their labor during that year; for that said proceeds fall into and constitute part of the residuum, and pass under the said 25th and 26th clauses of said will.

6th. That for the same, as well as for other good and sufficient reasons, there is no equity in so much or such parts of said bill wherein is sought a recovery of rent for the plantation whereon said Thomas E. resided, or an equivalent for the use, enjoyment and cultivation thereof since testator's death.

7th. That there is no equity in so much and such part of said bill wherein is sought a recovery of the stock, farming utensils, and other articles on said plantation, being at testator's death, and of the crops thereon had; for that said personalty, by the 23d and 24th clauses of said will is directed to be sold, and the proceeds of the sale thereof is disposed of by the 25th and 26th clauses thereof.

8th. That there is no equity in so much and such part of said bill wherein is sought a recovery of the sum or sums of money which would have been necessary to remove, or used as expenses in removing said slaves from the State of Georgia; for that said expenses are directed to be taken out of a fund, (no sum being designated,) the balance of which sum is disposed of by the 25th and 26th clauses of said will.

9th. That the guardian of Nancy Goings and James A. Watson, and the Justices of the Inferior Court of Columbia county, none of whom have been served, and one of whom has not been named in said bill, are necessary parties, without whom said cause cannot proceed.

The said demurrer came on to be heard before his Honor

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the said Judge, at chambers, when the counsel for the complainant requested the decision of the Court upon the points and to the effect following, that is to say:

1st. That Nancy Goings, being a free person of color, is incapable of taking the devise conveyed for her benefit in the 9th clause of Thomas E. Beall's will; the said devise is therefore void.

2d. The devise of the 10th clause of said will to J. Watson is void, because of indefiniteness and uncertainty in its terms.

3d. The complainant, as heir at law of Thomas E. Beall, is entitled to have and receive the *estate for life* in said lands thus undisposed of, if the said devises, or either of them is void—the same passing to him, and not to the residuary legatees.

4th. He is also entitled to have and enjoy the *term for years* in the land or plantation conveyed for the use of the slaves of testator, by the 17th clause of the testator's will, the said clause having been declared void and invalid, and this estate being thus left undisposed of by the will.

5th. As heir at law, he is entitled, too, to the *accumulations* which have been made upon said plantation since testator's death.

6th. As such heir he is also entitled to have and receive all such portions of the proceeds of the sale of testator's real estate, directed by said will to be employed in removing the said slaves to a free State, or in the arrangements necessary thereto, if the 15th, 16th, 17th, 18th, 19th, 20th and 24th clauses of said will had not been declared null and void.

7th. That the reason for the rule which at common law passed all personal property not disposed of by the failure, lapse, or illegality of any of the clauses of a will, to the residuary legatee, does not in effect exist in Georgia, and therefore the rule does not exist. Consequently there is no more reason in our State, why [if the *heir at law* can only be excluded by express words and plain meaning from taking real estate so undisposed of] the next of kin should be excluded

from undisposed of personal property, except by express words, than should the heir at law from real estate.

8th. That if this rule be not repealed, still it is only the *general* rule; that to it there are exceptions, and that a residuary bequest of a particular fund, or of the balance of cash remaining, after the estate has been settled up and all debts paid, [unless there be something in the will expressly to the contrary,] forms such an exception; and that this case forms such an exception.

9th. That though the propositions in the last two requests directed to the Court be not true, still that inasmuch as the aforesaid clauses have been declared void, and by judgment of law the slaves by them sought to be manumitted have passed to the complainant as next of kin the personal property which was *incident to* or *dependent upon* such manumission, must also pass to the next of kin.

10th. That he is, consequently, entitled to such stock, utensils, &c., as was directed to be used on the plantation for the negroes emancipated; also, to such amount of the crop, corn, fodder, bacon, and other such articles as were directed to be placed upon said plantation for said slaves.

11th. That he is entitled to such amount of money as would have been employed in the removal of said slaves, by virtue of the provisions of said will, so declared void; such amount being now undisposed of by the will.

12th. That as heir at law and next of kin, he is entitled to have and receive all the property, real and personal, not disposed of by reason of the failure of said clauses.

13th. That he is entitled to receive a reasonable *hire* for the said slaves, from the death of the testator to the time when they were delivered up to complainant.

14th. That as next of kin, he is entitled to the amount of cash remaining, bequeathed by the 25th clause:

1. Because, with the fund out of which this residuary bequest is to be taken, is blended the amount of expenses directed to be incurred in the manumission or removal of said

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slaves; and this amount belonging by effect of law to the next of kin, and being now not to be ascertained, "the balance of cash" bequeathed cannot be determined; and therefore this clause cannot be executed for uncertainty.

2. This clause is void for uncertainty because it is a bequest to "poor orphans, citizens of Columbia county," or failing these, to "poor children of said county."

After argument heard, his Honor, the Judge sustained the second and third grounds in said demurrer contained, and refused to decide as asked in the first and second requests above specified. And the counsel for complainant tendered his bill of exceptions, saying,

1st. That the Court erred in deciding that Nancy Goings was not incapable of taking the land devised to her by the 9th clause of said will, and that the disposition made in said clause might be legally carried into effect.

2d. That the Court erred in deciding that the devise in the said 10th clause was not void for indefiniteness and uncertainty.

The counsel for the defendant tendered his bill of exceptions, saying,

1st. That the Court erred in holding that the 25th and 26th clauses of said will were invalid, that the subject matter of the devise and the objects of the testator's bounty were not clearly ascertainable, and that the charity was not legal, wise and beneficent.

2d. In holding that the complainant was entitled to recover hire for the slaves, referred to in the 5th ground of demurrer, or the proceeds of their labor, for the year 1856, and that the said proceeds did not fall into and constitute a part of the residuum, and pass under the said 25th and 26th clauses.

3d. In holding that complainant is entitled to recover rent for the plantation whereon Thomas E. Beall resided, or an equivalent for the use, enjoyment and cultivation thereof since the death of testator, and the possession and enjoy-

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ment of the same until the expiration of the four years for which it was to be enjoyed by the slaves.

4th. In holding that he is entitled to recover the stock, farming utensils and other articles on said plantation at testator's death, and the crops thereon, and that the same was not disposed of legally by the said 25th and 26th clauses of said will.

5th. In deciding that he is entitled to recover such sum or sums of money as would have been necessary to remove, or would have been employed in removing the slaves aforesaid from the State of Georgia; and that said expenses were not taken out of a fund, (no sum being designated,) the balance of which is disposed of by the said 25th and 26th clauses.

STARNES, for plaintiff in error in the first case, and for defendant in error in the other.

JENKINS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

There are cross bills of exceptions filed in these cases. By the 9th clause of Thomas E. Beall's will, the testator says: "I reserve the tract of land situate, lying and being, in the county of Columbia, on the waters of Sweet Water Creek, adjoining lands belonging to the trustees of the Methodist Episcopal Camp Ground, it being the tract of land that I purchased from Morgan, and formerly owned by Mathew W. Stanford, containing one hundred acres more or less, for the use and support of Nancy Goings, a free person of color, it being the place whereon she now resides, during her natural life, and after her death, the same to revert back to my estate; and that said tract of land shall not be liable for the debts or contracts of said Nancy Goings."

— "Item 10th, I reserve the tract of land, situate, lying and being in Columbia county, on the north side of the Wrightsboro road, on the waters of Big Kiokee Creek, containing one

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hundred and eighty acres, be the same more or less, adjoining lands of Benjamin Upton, Lamar and others, it being the tract of land that I purchased of Valentine Watson, for the use of James A. Watson during his natural life, or so much thereof as he can cultivate for a support, it being the place whereon said Watson now resides, and at his death, the same to revert back to my estate; but said land shall not be liable for the debts or contracts of said James A. Watson."

The Court upon demurrer to the bill filed in this case was asked to decide, that the devise in the 9th item of the will was void, because Nancy Goings, being a free person of color, was incapable of taking under this devise. And that the 10th clause was void, because of the indefiniteness and uncertainty of its terms. On the contrary, the Court held that these bequests were valid; and this constitutes the alleged error in this bill of exceptions.

Was the Court right?

It might be plausibly contended that the *title* to the tract of land, did not pass to Nancy Goings, under the 9th clause of the will, there being no words of gift, grant or alienation. The operative words are, "I reserve for the use of Nancy Goings" &c. Reserve the tract of land from what? From sale by his executors as afterwards directed in regard to his lands generally in the 23d item of his will; Nancy Goings was to have the use and occupation; but the title to remain in the executors, and the provision, that the life interest thus given should not be subject to her debts, harmonizes with this idea.

But suppose it be a life interest bequeathed to this free person of color, is she not competent to take and hold it, under the laws of this State? I once thought otherwise, but subsequent examination has shaken my confidence in the correctness of that opinion.

By the 8th section of the Act of 1818 (*Cobb* 993) free persons of color were not permitted to purchase or acquire any real or personal estate. But by the 3d section of the Act of

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1819, (*Cobb* 995) this section of the Act of 1818 is repealed, so far as it respects real estate, except in the cities of Savannah, Augusta and Darien. What is the necessary implication? Why, that free persons of color in Georgia, except in the three cities designated, may acquire real estate. And this inference is confirmed by the Act of 22d January, 1852, (*Phamplet* p. 101,) regulating the sale of real estate "belonging to free persons of color."

While, therefore, I exceedingly doubt the policy of allowing free negroes to acquire and hold real estate, and that too without limitation as to quantity, still the correction of the evil, if it be one, is with the Legislature and not with the Courts.

We do not see any insuperable difficulty, as it regards the tenth item of the will. It was intended by the testator to give James A. Watson, we apprehend, a life estate in the whole tract of land, to be used and occupied by him, for the purpose of cultivation; and for nothing else. He could not lease or otherwise dispose of it.

Can the 25th and 26th items of the testator's will be executed? The circuit Judge held, that these clauses were invalid; because the subject matter and objects of the testator's bounty were not clearly ascertainable: And further, that the charity therein created was not legal, wise and beneficent.

This decision is assigned as error by the other side, and constitutes the second bill of exceptions.

After much reflection on this case, and with a sincere wish to fulfil the intentions of the testator, which are highly commendable, we fear it will be difficult if not impossible to execute this will.

Who are the poor orphan children of Columbia county designated as the beneficiaries, of the testator's bounty? And how are they to be ascertained? The poor children of a county or congregation or school are not susceptible of ascertainment; and when such terms are used in wills, as *designatio personarum*, they have always been determined to be insufficient

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and the devise or bequest intended to be created by them, to be void for uncertainty. (*Powell on devises*, 419 ; *Com. Dig.* 412 ; *Bac. Ab.* 159 ; *Dashiell and others against the Attorney General and others* 5, *Harr. and John.* 392, and the authorities there cited.)

And this difficulty cannot be remedied by the doctrine of *Cy. Pres.* in our State ; nor by the statute of Elizabeth ; nor by the inherent powers of a Court of Chancery, 14 *Ves.* 342 ; 2 *Iredell* 255 ; 4, *Dana* 357 ; *Adam's Eq. title Master*. And an Act of the Legislature to cure the defect would be void as against the heir at law, in whom the title to the property vests.

There are other serious, if not insurmountable obstacles in this case, what amount of education is to be bestowed upon these poor orphan children ? If no more than the law now supplies, the fund is not needed. In case the fund will not furnish adequate means for giving the mere rudiments of an education to all of this class, how is it to be apportioned ? What was the wish of the testator upon these and numerous other points, which naturally suggest themselves ? We are left to conjecture. A Court of Chancery, or even the Legislature undertaking to frame a scheme, might be wide of the mark contemplated by Mr. Beall, and this is the danger, in all these cases.

The cases show that a devise is void, which gives a latitude of discretion to the trustees. Who then shall supply a plan for the application of this fund ? Many might be able and willing to do so. But would that be the will of the testator ? And it is that, and that alone, that we are called upon to carry out. What two minds would agree, touching the dispensation of this charity ? For myself I am constrained to say, that so far as my knowledge extends, the *poor school* system has proved a failure in this State. Common schools may succeed, experience will show. Any system, which stops short of feeding and clothing the destitute children obtaining an educa-

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tion, will accomplish nothing. The Girard charity is based upon this truth ; and herein consists its wisdom.

While therefore I am delighted to see the manifestation made by Mr. Beall in the right direction, and for which his memory deserves to be consecrated in the hearts of the benevolent, I regret that his humane purpose, should miscarry, for want of being more specific. I sincerely trust that our men of wealth, who are encumbered with large estates, with no immediate objects of their bounty upon whom to cast their wealth, will, while imitating his noble and praiseworthy example as to its ends and aims, take more precaution as to the mode and manner of effectuating their designs. While the North is studded all over with institutions to alleviate the sufferings and promote the welfare of our race, endowed by munificence of private persons, our people heap up riches and die and know not who shall gather them, whether a wise man or a fool.

Judgment affirmed.

BENNING, J. concurring.

The Court are unanimous on all the questions in these two cases, except those growing out of the 25th and 26th items of the will. Therefore, I shall confine myself to those two items.

The Court below held those two items, void. I think, that it ought to have held them, void. I think, that they are void for *uncertainty*.

What persons were meant by the expression, "poor orphan children, citizens of the county of Columbia?" Persons in existence at the time of the testator's death, or such persons, and their successors through all time? How poor must persons be, to meet this description, wholly destitute of property, or how nearly so?

The same questions may be asked, of the expression, "poor children of the county of Columbia."

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There is to be raised, "an education fund for the purpose of educating poor orphan children." &c.

What is meant by "*educating*?" 1st, as to the branches to be taught; 2d, as to the extent to which, the branches are to be pursued; 3d, as to the time during which, each child is to enjoy the benefit; 4th, as to the school to which each child is to be sent, whether a school got up for the special purpose, out of the fund, or some, and what, school of the county? 5th, as to the great question of maintenance during the period while the "*educating*" is going on? The poor have to be fed, and clothed, and lodged, or they cannot be educated.

It seems to me, that there is no certainty as to what the testator had in his mind, in these respects. There is nothing by which, we can *at all* determine what his *scheme* was.

When this is so, ought the testamentary disposition to be held good? Executing such a disposition must be all blind guess work, so far as the intention of the testator is concerned.

No case sanctioning a disposition so uncertain as this was cited. The Girard will case comes the nearest to doing so, but in that case, the disposition uncertain as it was, was certainty itself, as compared with the disposition in this case. See sections, 3, 4, 5, 6, 7, 9, of the XXI item of Girard's will 2 How. 131.

I think, then, that these two items in the will, are void for being uncertain in the respects above indicated.

The items, are, I think, obnoxious to other objections, but I content myself with mentioning this one.

McDONALD, J. dissenting.

RICHARD H. McLEOD et al., plaintiffs in error, vs. THE SAVANNAH, ALBANY AND GULF RAILROAD COMPANY, defendants in error.

The Legislature, in 1806, authorized Joseph Hill to erect a toll bridge across the Great Ogeechee, at a particular place; and the Act provides that it shall not be lawful for any one to erect any other bridge within five miles above or below. The toll bridge was built, and has been kept up ever since. In 1847 and 1851, the Legislature authorized the construction of a railway across the same river, between Savannah and Albany, which would necessarily cross near the first bridge, and which was actually carried across, within a mile and a half below the same.

Held, That the franchise granted to the Railroad Company was not the same as that conferred on the first grantee, nor so similar as to be deemed an infringement upon the prior charter, in the sense in which a new bridge or ferry interferes with one previously established at the same point; and that no injunction will be granted, nor compensation decreed, by way of damages in such case.

In Equity, from Chatham county. Decided by Judge FLEMING, January Term, 1857.

Richard H. McLeod and William F. Law, trustees of Sarah E. King, and William King, the husband of the said Sarah E. King, and others, filed their bill of complaint against the Savannah, Albany and Gulf Railroad Company.

To this bill of complaint the defendants filed a general demurrer.

After argument, the Court below gave the following decision, in which will be found a statement of the facts of the case:

In 1806 the Legislature of Georgia granted to Joseph Hill, his heirs and assigns, the right to build a toll bridge across the Great Ogeechee at a designated place. The fifth section of this act provides "that it shall not be lawful for any person or persons, at any time or times, to build any bridge or keep any ferry on the river Great Ogeechee, within five miles either above or below the said bridge, which is hereby exclusively vested in the said Joseph Hill, his heirs and assigns." The above fifth section contains the obligation of the public entered into through the Legislature, to Joseph Hill, his heirs and assigns. The consideration of this ob-

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ligation is, "that the said Joseph Hill, his heirs or assigns, shall erect the said bridge in a complete and substantial manner, at least sixteen feet-in width, and capable of sustaining and passing over *all carriages in common use*, within three years from the date of the Act, and rebuild the same when necessary, and keep the said bridge in good and sufficient repair forever." They fix the tolls he is to receive by saying, that they shall be the same as are provided for in the Act of 1790 to Wade Hampton and James Green. In that Act the tolls are particularly specified for "loaded wagons and other four wheeled carriages, for empty carts and trays, for a man and horse, for foot passengers, for black cattle, for hogs sheep and goats, for rolling hogsheads drawn by horses." From this it necessarily follows that the bridge to be erected by Hill was to be capable of sustaining and passing over, not only all carriages in common use, but also horses, foot passengers, black cattle, hogs, sheep, goats and rolling hogsheads. The above, then, is the obligation of Hill to the public, the consideration of which is the exclusive privilege granted to him. The bill alleges and the demurrer admits, that Hill and his assigns have fulfilled their part of this contract, they are therefore entitled to all the rights, privileges and emoluments granted in the charter. The only question is, whether the bridge constructed by the defendant infringes upon those rights and privileges, and *thereby* takes away, or destroys, or depreciates the value of those emoluments. I say *thereby*, because although subsequent legislation may impair or destroy the value of a franchise, previously granted, yet if the subsequent legislation does not violate the exclusive privilege previously granted, the party has no right to complain. For the party to have a right to redress, the subsequent legislation must have been *prohibited* by the first. This I understand to be now the settled doctrine of this country, and I also understand that this is admitted by the counsel for complainants.

But to return : The question for my decision is, whether the bridge constructed by defendant is a violation of the exclusive privilege of the complainants. I enter upon the consideration of this question with great diffidence, not only because of its intrinsic difficulty, but because the few decisions to which I have been referred in the argument, are inconsistent with each other. Acknowledging my indebtedness to the very able argument of counsel on both sides, I proceed to the consideration of the question before me.

In the case of *McLeod and others vs. Burroughs*, the Supreme Court of Georgia say : "The Act of 1806 is a contract between the grantee, Hill, and the Legislature; both parties are *bound* by its stipulations; what its meaning is, is for the Courts to determine. The grantee proceeds to invest under it according to his understanding of its provisions. He does so at the peril of a different construction by the Courts; they can only act when a case is made." The case is now made, and the duty is upon me to construe this contract between Hill and the Legislature.

One principle and an important principle in the construction of this contract between Hill and the public, is stated by the Supreme Court in the case from which the above quotation is made, and in which case this very charter to Hill was before the Court. They say : The exclusive privilege (meaning the exclusive privilege to Hill) "is in derogation of a common right, and the act which confers it *must be strictly construed*." By strict construction I understand that nothing is to be considered as granted which is not expressly granted; in other words, nothing is to be considered as granted by *implication*. What then is expressly granted to Hill in this charter ? The exclusive privilege is expressly granted him of erecting and keeping a bridge across the Great Ogeechee, for the passing over of all carriages *in common use*, for the passing over of horses, foot passengers, cattle, hogs, sheep, goats and rolling hogsheads. Now a railroad bridge constructed for the purpose and the *exclusive* purpose of sus-

taining and passing railroad cars, is not a bridge capable of sustaining and passing carriages in common use, or any other article or thing for which Hill is entitled under his charter to charge toll, with the single exception of foot passengers. [Passengers in carriages are not liable to pay toll, they only pay for the carriages in which they pass.] Railroad bridges are incapable, not because they want strength, but because they are not so constructed as to permit the passing of anything but railroad cars. Foot passengers may get over, though not very safely, and the railroad is bound to prevent it or respond in damages. The question of damages from this cause, however, is not before me, the bill having made no charges or allegation as to this matter. To construe the exclusive privilege of Hill as extending to a railroad bridge, constructed for the exclusive purpose of passing their cars, you must resort to implication; you cannot find it *expressed* in the words of the grant. The moment you extend it to such a bridge, you violate the principle of *strict construction*, which the Supreme Court say, "is the rule for construing this charter—it being in derogation of a common right."

Again: This charter is a contract between Hill and the public. The obligation of the one is the consideration for the obligation of the other. Precisely, then, where the obligation of the one stops, the obligation of the other stops also. The obligation of each is a safe and just rule for measuring the obligation of the other. Now I ask, is Hill under his charter bound to furnish a bridge capable of sustaining and passing railroad cars? [Let it be remembered that five miles is *not* the exclusive privilege, but *the limits within which* the exclusive privilege is to be exercised.] If the Legislature in granting to the defendant the authority to build this bridge, violated the exclusive privilege of Hill, it must be because Hill's charter granted to him the exclusive privilege of building it. The privilege and the obligation of Hill are coextensive—they go hand in hand, and where his privilege stops, his obligation stops, and where his obligation

stops, his privilege stops. What is his obligation? His obligation is to furnish the public with a bridge capable of sustaining and passing all carriages in *common use*. Now there can be no question that this means carriages in common use at the time the Act was passed; railroad cars were not in common use at that time; indeed, they are not in common use now, being used exclusively by railroads. Hill, then, is under no obligation to furnish a railroad bridge, and if that is not his obligation, then it is not *the privilege* exclusively granted him in his charter. And if it be not his exclusive privilege, how can it be a violation of that privilege to grant it to another? I repeat, the obligation and the privilege of Hill go together, and where his obligation stops, his privilege stops also.

Again suppose (and in this age of great, and wonderful, and rapid improvement almost any supposition may be realized,) suppose that all carriages in common use at the time Hill's charter was granted should cease to be used at all, and that carriages should come into common use propelled by steam, electricity, condensed air, or any other motive power, that in the march of human improvement may be discovered, and which carriages the bridge of Hill could not sustain and pass over: would Hill or his assigns be compelled by the terms of their charter to furnish a bridge capable of sustaining and passing these new vehicles? I apprehend not; they could say, and doubtless would say, we are only bound to furnish a bridge capable of sustaining and passing carriages in common use at the date of our charter. Well, if they are not bound, then it is not their exclusive privilege, and if not their exclusive privilege, then it is no violation of that exclusive privilege to authorize some one else to erect a bridge capable of answering the wants and necessities of the public. The supposition I have made, is, I grant, a very improbable one, but no man acquainted with the improvements of the last fifty years will say that it is an impossible one.

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But be this as it may, it is a stronger case for the complainants than the one actually before me. In the case I have supposed, it might be contended by Hill and his assigns that it was their exclusive privilege to furnish a bridge for the passing of carriages in common use, *without reference to the date of their charter*. I have no idea that this position could be maintained in any Court of justice, but there would at least be some foundation for an argument. The case before me is very different. Railroad cars, as already stated, are not in common use. They are used only by railroads. Hill and his assigns, under no possible construction of their charter, can be held bound to furnish a bridge capable of sustaining and passing them. Now if I am right in the proposition that when the obligation of Hill stops, his privilege stops, and that when his privilege stops, all restrictions upon the public stop, then it would be no violation of the charter of Hill, to authorize the defendant or any one else, to erect a bridge capable of sustaining and passing railroad cars.

If the wants and necessities of the public require such a bridge, and the charter of Hill *does not bind him to furnish it*, then it is not only the *right* but the *duty* of the Legislature to authorize some one to provide it. This cannot be a violation of Hill's charter, for the right and privilege of furnishing a bridge, except for the passing of carriages in common use, was never vested in him. In other words, Hill and his assigns have no exclusive privilege of building a bridge for the passing of railroad cars. The prohibition to the Legislature stops where the exclusive privilege of Hill stops.

This reasoning, however, will not avail, if it be true, as contended by complainant's counsel, that the Legislature *has not authorized* the defendant to build their bridge within the exclusive limits of Hill. The charter of the defendant grants the right to build a road from the "City of Savannah, or some point on the Central Railroad, near Savannah, to Alba-

ny on the Flint river, with express power to adopt such route as the said company may select." This necessarily involves the power to build a bridge across the Ogechee somewhere. Are the five miles excluded? They are if a bridge within those five miles would be a violation of Hill's charter. But if I have been right in the views I have submitted, a bridge within the five miles, for the passing of railroad cars, *would not be a violation* of Hill's charter. The same reason that would make a bridge *beyond* the five miles lawful, applies to a bridge *within* the five miles. Why would a bridge beyond the five miles be lawful? Because it would not violate the exclusive privilege of Hill. Then a bridge within the five miles would be lawful for the same reason, because it would not violate the exclusive privilege of Hill. The charter of defendant, in my view, grants the power to build a bridge for the passing of their cars across the Ogechee at any point where the route selected should strike it, provided the said bridge should not interfere with any chartered rights. I have shown, or at least attempted to show, that the bridge in its present location, does not interfere with any chartered rights.

The above is also an answer to another proposition of complainants' counsel, that even if the Legislature have granted the authority to build a bridge within the exclusive limits of Hill's charter, such act of the Legislature would be unconstitutional and void. The act of the Legislature cannot be unconstitutional, unless it violates the charter of Hill; but I have already decided that it does not violate the charter of Hill.

The demurrer is sustained, and the bill dismissed with costs.

To this decision the complainants' counsel filed their bill of exceptions, saying that the Court erred on the following grounds:

1st. Because his Honor the Judge erred in deciding that the bridge constructed by the Savannah, Albany and Gulf

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Railroad Company, thereby taking away, or destroying, or depreciating the value of the franchise previously granted to the complainants, did not violate the exclusive privilege previously granted to the complainants.

2d. Because his Honor the Judge erred in deciding that the bridge erected by the Savannah, Albany and Gulf Railroad Company across the Ogechee river, did not violate the exclusive privilege previously granted to Joseph Hill, his heirs or assigns.

3d. Because his Honor the Judge erred in deciding that the bridge erected by the Savannah, Albany and Gulf Railroad Company across the Ogechee river, did not violate the fifth section of the act of the Legislature of Georgia, providing that it should not be lawful for any person or persons, at any time or times, to build any bridge or keep any ferry on the river Great Ogechee, within five miles either above or below the said bridge, which was by the said Act exclusively vested in the said Joseph Hill, his heirs and assigns.

4th. Because his Honor the Judge erred in deciding that the bridge erected by the Savannah, Albany and Gulf Railroad Company over the Great Ogechee River, is not a violation of the exclusive privilege previously vested in Joseph Hill, his heirs and assigns.

5th. Because his Honor the Judge erred in sustaining the demurrer and dismissing the bill.

WARD, OWEN & JONES for complainants.

LAW, BARTOW & LOVELL, *contra*.

By the Court—LUMPKIN, J. delivering the opinion.

This is a proceeding in equity at the instance of Wm F. Law and others to restrain by injunction the Savannah, Albany and Gulf Railroad Company from using a bridge constructed by them on the Great Ogechee river; or by an alter-

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native prayer, to compel them to pay damages for a disturbance of the franchise vested in complainants, as the assignees of Joseph Hill.

By an Act of the Legislature of Georgia, passed the 26th of June, 1806, the exclusive right of erecting a bridge over the great Ogechee, at a place designated in the Act, and on certain specified conditions, was vested in Joseph Hill, his heirs and assigns, *Clayton's Dig. p. 298*. The grant is in these words: "It shall not be lawful for any person at any time or times to build any bridge or keep any ferry on the said river, great Ogechee, within five miles, either above or below said bridge, which is hereby exclusively vested in the said Joseph Hill, his heirs and assigns."

The complainants aver themselves to be the assignees of Joseph Hill, the grantee; and that all the conditions of the Act obligatory on them, have been duly complied with.

By an Act of the Legislature, passed the 25th of December, 1847, and amended the 20th of December, 1857, a company was incorporated by the name of the Savannah and Albany Railroad Company; and invested with all the privileges of any other railroad company, for the purpose of constructing a road from Savannah or some point on the Central Railroad near Savannah to Albany on the Flint river, with express power to adopt such route as the company may select. The defendant has selected a route which crosses the great Ogechee river within five miles below the bridge erected by Hill, and now in the hands of his assignees, the complainants, over which their trains are carried in the prosecution of their business.

The complainants did not attempt to restrain the defendant in any other way, except by a written notice, from building the bridge; a copy of which is attached as an exhibit to their bill. They now pray for an injunction to restrain the defendant from using their bridge, alleging its construction to be a violation of the Act of 1806; and an infringement upon their exclusive grant; or in the alternative, such com-

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pensation by way of damages as a Court may decree to be fit and proper.

To this bill the defendant has filed a general demurrer, and the great question raised by the demurrer is, and which goes to the whole bill, whether the construction by the defendants of their road across the great Ogechee river within five miles of the old bridge is a violation of the exclusive right vested in the complainants? If it be decided in the negative, the bill of course contains no equity.

That the defendants pass the great Ogechee river constantly with their locomotives and trains on a structure they have laid across said river within the limits secured to the complainants, is not denied. That this structure is not only called a bridge, but that it was erected for the safe and expeditious passage of passengers and freight, whether from greater or less distances, over this stream, in the cars or carriages, provided for that purpose, is not disputed. Still the defendant insists, that notwithstanding all this, theirs is not such a bridge as was contemplated by the complainants' charter; and upon this single point this case rests.

It is too late perhaps to deny, that the franchise granted in 1806, is a contract. The decision of the Supreme Court of the United States, in the celebrated Dartmouth College case, has imposed that doctrine, at least for the present, upon the Courts of this country, whether it be irreversibly established, time alone can show. Nor need counsel argue so earnestly, or declaim so eloquently, in favor of the inviolability of contracts. The sole inquiry for us is, the true exposition of the charter of 1806. Settle that, and the controversy in this case is ended. For while it is admitted, that individual interest must be subservient to that of the public, and must yield when the public necessity requires it; and that chartered rights no more than any others, are exempt from this paramount right of the State, to take private property for highways or any other public purpose, still neither in this, nor any other

constitutional government, will this be done, without making to the individual aggrieved, just compensation.

Grant that the franchise in this case is as broad as complainants contend it is, still, if a crossing for the Savannah and Albany Railroad would have been impossible at any other place, the old bridge site itself might have been seized and appropriated for this purpose, by virtue of the power of eminent domain residing in and reserved to the people of the State; making due compensation of course to the proprietors.

We come back then to the enquiry, have the chartered rights of the complainants been violated by the defendant?

No one pretends, that the structure erected over the Ogeechee river, by the defendant is not a bridge. But is it a bridge in contemplation of the Act of 1806? Repudiating as I always do, the two modes of construing the statutes referred to by law writers, the one literal and the other liberal, I ask, as the only true guide, what did the Legislature mean? For having ascertained that, we cannot bind them beyond what they intended to bind themselves. Otherwise you force upon the public the performance of a contract which they never made.

The Legislature granted to Joseph Hill the privilege of erecting a bridge, and when from accident or decay, it became impassable, they granted also, the free and quiet enjoyment of a ferry on the same conditions as those of the bridge. They granted the privilege of erecting a toll bridge, capable of sustaining and passing all carriages in common use, at the date of the Act; and in the contingency stated, of keeping a ferry for the purpose of passing such carriages. They allowed, to Joseph Hill, the same tolls that were already allowed to Wade Hampton and James Gunn, by the Act of 1790; and I would here remark, that a charter had been granted to Wade Hampton, and General James Gunn, and a bridge was erected; but the franchise to these grantees was

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revoked by the Act of 1806, on account of alleged misuser; but without any judicial forfeiture having been declared.

But to resume. The Legislature in the grant to Hill specified the kind of bridge to be built, and the purposes to which the exclusive privilege applied, by the tolls provided for in that Act, which were, for loaded wagons, and other four wheeled carriages; for empty carts and drays; for a man and horse; for foot passengers; for black cattle; for hogs; sheep and goats; and for rolling hogsheads drawn by horses.

These provisions are sufficient to satisfy any one, that the exclusive privilege granted to Joseph Hill, was that of erecting a bridge for the transit of carriages then in common use; and for the other articles enumerated in the Act of 1790; and that consequently the protection secured to him by the 5th section of the Act of 1806, was a corresponding protection; that is, a protection against the erection of any similar bridge used for similar transportation; and that it cannot be extended without doing violence to the obvious meaning and true intent of the grant, to the construction by a railroad company, under Legislative sanction and authority, of a bridge for the sole purpose of affording transit for its cars.

But this point is put beyond all dispute from the fact, that railroads at that distant day, were wholly unknown in this country. Therefore the Legislature could not have meant to guard against interference by a mode of crossing, of the very nature and existence of which they had no knowledge.

Whether then we look to the language of the Act construed with reference to the subject matter, to the intention of the Legislature, interpreted by the state of things existing at the date of the Act, to the situation of the parties, or to the thing granted—its nature and use at the time, it seems clear that the prohibitory clause in the Act of 1806, cannot, in justice and fairness, be made to extend to a bridge, erected for the transit of the cars of the railroad company, and for the

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purpose alone; the said clause being utterly irrelevant to that sort of bridge.

But it is insisted that all this can make no difference, and the question is propounded, can a grant of this kind be infringed, because an advantage not contemplated at the time, may result from its violation. It is asked, is there any implied condition in such a grant, that upon some new improvement being made, the grant should be void?

Without stopping to examine whether this be a candid mode of meeting the difficulty, we understand it to be now solemnly settled, that the grantee in such a case as this, can take nothing by implication. *Charles River Bridge vs. Warren Bridge*, 11 Peters, 420; *Shorter vs. Smith*, 9 Ga. R. 517. And further, that the rule which requires the grant to be taken most strongly against the grantor, does not apply to a Legislative Act. But that on the contrary, any ambiguity in the terms of a charter, shall operate against the grantees; and that grants of exclusive privileges to corporations or individuals are to be strictly construed. And that if the terms of the contract are doubtful, the doubt must enure to the benefit of the public. *McLeod et al. vs. Burroughs*, 9 Ga. R. 220, 221, 222; *Justices of the Inferior Court vs. Plank Road Company*, 9 Ga. R. 479, 480; *Devarris on Statutes*, 40, 41, et seq. 48; *Mayor of Macon vs. M. and W. Railroad*, 7 Ga. R. 227.

Our conclusion is, that the structure on the great Ogeechee river by the defendant, is part of the railway only; and not a bridge in the sense of the charter of 1806. Certainly it is not a toll bridge in the meaning of the franchise granted to Joseph Hill. That if the value of the complainants' franchise be impaired by the Acts of 1847 and 1851; still this does not impair the obligation of the contract entered into by the State, with Joseph Hill; there being nothing in that contract to deprive the people of Georgia of the benefits of the new system of intercommunication introduced by the invention of railroads; nor to forbid the passage of a law

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authorizing the construction of a railroad at the place in question. Indeed for myself, I am strongly inclined to think, the Dartmouth College case to the contrary notwithstanding, that it was not in the power of the Legislature of 1806, to make a contract, of the character that this is claimed to be, which should have the effect of taking from their successors, for all coming time, the right of opening any such new methods and channels of trade and travel, as their posterity, at the end of a half century, might deem essential to the comfort, convenience and prosperity of the present and future generations.

It is yielded in the argument, that it is not the line of travel, but the right of portage merely, that has been granted to the complainants; and that the defendant could tunnel the river and cross immediately under the complainants' toll bridge. In my judgment, this surrenders the whole case. For we have seen, that there is no such magic in the mere word bridge, that can constitute the right to interfere in this case.

On the one hand, the railroad bridge can be used merely for the appropriate purpose of passing locomotive engines, and trains of cars on their way between the termini of the road and the various intermediate stopping places; and is incapable, as a bridge, of being used for the passage of any vehicle, animal or even foot passenger for whose passage the complainants are entitled to receive toll: and therefore does not violate the charter granted to Hill. And on the other hand, complainants' bridge has not the capacity to carry over the river the company's engines and trains; and even if they could, it would be questionable, whether they would be entitled to collect toll for the same. The franchises are totally different and do not interfere the one with the other; what is the defendant to do? They have a right of transit across the river. The complainants cannot and will not pass them. Are they not entitled to provide the means of crossing themselves? A caravan arrives with an enor-

mous elephant, the old bridge is too weak to bear the weight of the animal. The proprietor refuses to put him over. Have not the owners a right to provide the means by flat or otherwise to transport their property?

But we forbear to discuss the question. The identical principle involved, has come before the Courts of New York, and been solemnly adjudicated adversely to the claim set up by the complainants in their bill. In the case of the *Mohawk Bridge Company against the Utica and Schenectady Railroad Company*, 6 Paige, 564. Chancellor Walworth says: "Neither is the Legislature deprived of the power to provide for the conveyance of freight or passengers, from one part of the State to another, by an improvement which was entirely unknown, at the time, when the grant to the bridge company was made. And if the grant had in terms given to the corporation the exclusive right of erecting a toll bridge across the river at Schenectady, this subsequent grant to the railroad company to cross the river with their railway from Schenectady to Utica, and to transport passengers thereon, in the ordinary course of their business, in the conveyance of travelers from one place to another, would not have been an infringement of the privileges conferred by such prior grant; as the railroad bridge would not be a toll bridge, within the intent and meaning of the grant to the first company."

I am aware that a decision has been made in Connecticut counter to those in New York. But it is New York, and not Connecticut, that has given the law to the States of this Union, as the history of our jurisprudence will demonstrate.

It is needless to kick against the pricks. Old things must give place to new. The forest must yield to the waving harvest and golden fruit; the red man of the woods to the sturdy and stalwart Saxon; the turnpike to the canal, and both to the railway. The complainants' were free to abandon their bridge at any time, as did Hampton & Gunn, and there was none to molest them. There was, in this respect, no mutuality in this, so called, contract. And if their profits

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have been impaired by this new mode of travel and transportation across rivers and morasses, they stand in no worse situation, and are no more entitled to compensation, than are thousands of individuals throughout the land, who are daily subjected to losses and ruin by new inventions and improvements, superseding and displacing those already in use. They have reaped no doubt, long ago, twice-told, the money they have expended, and should be satisfied with a monopoly of a half a century, granted improvidently, if not illegally—the prior right to Hampton & Gunn, never having been judicially forfeited. 3 *Kent*, 458; *Thompson vs. The People*, 23 *Wendell*, 579, 580, 596.

By my direction, my friend Mr. Smale, assistant Reporter, has inserted entire, in the bill of exceptions, the admirable judgment pronounced in this case by our brother FLEMING; from whom, whenever I have the misfortune to differ, which has been but seldom, I suspect the soundness of my own opinion. Would that the briefs of the able counsel who so thoroughly investigated this question, were allowed by law to be reported. Their omission in this and other cases is an irreparable loss to the profession. To their labors I am greatly indebted for the alleviation of my own.

Judgment affirmed.

BENNING, J. concurring.

The Savannah, Albany and Gulf Railroad Company erected a bridge for their Railroad, across the great Ogechee, “within five miles” of the toll bridge of the plaintiffs in error.

The charter of the company said what was equivalent to saying, that they might erect this bridge.

The fifth section of the Act of 1806, authorizing the erection of the toll bridge, has these words: “it shall not be lawful for any person or persons, at any time or times, to build any bridge, or keep any ferry, on the great Ogechee, within

five miles, either above or below the said bridge," (the toll bridge,) "which is hereby exclusively vested in the said Joseph Hill, his heirs, and assigns."

The second section had given to Joseph Hill, his heirs and assigns, the exclusive privilege of erecting the toll bridge.

The fourth section gave him the right to receive "a toll equal to that," theretofore, "granted to" "Wade Hampton and James Gunn."

The toll granted to them was, "for every loaded wagon, and other four wheeled carriage, four shillings and eight pence; for every empty wagon, two shillings and four pence; "for every loaded cart, or other two wheeled carriage, two shillings and four pence; for every empty cart, or dray, one shilling and two pence; for a man and horse, six pence; for a foot passenger, three pence; for all black cattle per head, three pence; for hogs, sheep, and goats, two pence; for every rolling hogshead with two horses, and drawn, one shilling and two pence; for every rolling hogshead with one horse, and drawn, one shilling and no more." *Watk. Dig.* 420.

The question may be stated in general terms, to be this: Have the plaintiffs, the owners of the toll bridge, a right to sue the Railroad Company, for the erection of the railroad bridge?

The Court below held that they have not; and I think, that it held right.

[1.] Grants of monopolies from the Legislature, like the grant contained in the Act of 1806, are to be construed strictly, so as to make them convey as little as possible.

This Court, speaking of this very grant, said, that such grants are to be strictly construed." *McLeod vs. Burroughs*, 9. *Ga.* 221.

These grants from the Legislature, occupy in our law, much the same place, which, grants from the King, occupy in the English law; and they must receive much the same construction. "By the" (King's) "grant of all mines in such a soil, altho' the grant be *ex certa scientia et mero motu*,

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mines royal of gold or silver, shall not pass, but the words, (soil and mines,) shall be taken in a common sense; and to a common intent; but to have them pass, there ought to be special words." 1 Coke 46. *The case of Allin Woods.*

According to this, the words, "any bridge," contained in the grant of 1806, are to "be taken in a common sense, and to a common intent." Taken in this manner they will no more include a railroad bridge, than will the words, "all mines," taken in this manner, include gold or silver mines. In 1806, when the words, "any bridge," were used, railroads and railroad bridges were unknown. It is therefore, impossible, that the legislature, in using the words, "any bridge," could have had railroad bridges in their mind.

I think, then, that the words, "any bridge," in the Act of 1806, do not include railroad bridges.

[2.] But, if I though they did, I should still think the plaintiffs not entitled to sue the defendants, or, at least, not entitled to recover of the defendants, more than nominal damages.

A toll bridge is a public highway over which, every body, with his goods and vehicles, has the right to pass. If there is a toll laid on him, or on his goods, or on his vehicles, he cannot pass without paying toll; if there is no toll laid on him or on his goods, or on his vehicles, he can pass without paying toll.

In the case of the present bridge, a man could pass the bridge, toll free, with a drove of mules or horses, or with camels, or elephants; or riding in a sleigh, or in a one wheeled carriage, for on none of these things is any toll imposed.

So, I suppose, for the same reason, the army, horse, foot, and artillery, could pass toll free.

In a word, every thing could pass; and every thing on which, no toll was laid, could pass toll free.

This being so, a railroad car, with its load of passengers, or freight, would have the right to pass the bridge toll free, for no toll is laid upon the passage of such a car. True, a

railroad car might find some difficulty in getting to, and over, the bridge ; but this does not affect the right ; and, besides, a time may come, and, in the opinion of many persons, will come, when the steam engine, with its train of cars, will be seen running on the common roads.

But if this be so, then it can be no injury to the bridge, that railroad cars do not pass over it, but pass the river elsewhere ; it must be a benefit ; it must be the means of saving the bridge, from much wear and tear, if not, from destruction, under the mighty weight of the strange engines and cars.

The case stands thus : The Railroad Company have the right to cross the toll bridge with their engines, cars, &c. toll free. They do not choose to insist on this right, but choose to cross on a bridge of their own ;—Can the owners of the toll bridge sue the Railroad Company for pursuing this course ? If they can, surely, it cannot be, that they are entitled to recover more than nominal damages.

I think the judgment of the Court below ought to be affirmed.

McDONALD, J. dissented.

R. W. ROGERS, Sheriff, &c., plaintiff in error, vs. ROBERT H. MAY, defendant in error.

A Sheriff arrested a defendant in *ca. sa.*, and took from him a defective bond under the honest debtors' Act of 1823, and let him go at large. In doing this, the Sheriff acted in good faith, and under legal advice. Afterwards, the Sheriff re-arrested the defendant, and took another and a perfect bond, under the Act aforesaid ; and this he did, time enough to make the bond, &c., returnable to the same Term, to which the first bond, &c., were properly returnable.

Held, That the Sheriff was not liable to a rule for the money due on the *ca. sa.*

Rogers, Sheriff, vs. May.

Rule, from Columbia county. Decided by Judge Holt, April Term, 1858.

A motion was made in the Court below by Robert H. May, for a rule *nisi* against Richard W. Rogers, Sheriff, to show cause why he should not be attached for contempt, in permitting a voluntary escape of Richard Downs, who had been arrested by said Sheriff, under a *capias ad satisfaciendum* in favor of Robert H. May vs. Richard Downs.

The Sheriff showed for cause, that on the 5th of February, 1858, he had arrested said Richard Downs, and taken the bond then in Court and returned his acts and doings, with the writ and bond, to Thomas M. Berrien, from whom he received the writ; and that the said Thomas M. Berrien returned said writ and bond to the Superior Court. That in doing this, he acted in good faith and by advice of counsel; that on the 21st April, 1858, he had re-arrested Richard Downs, and taken a bond in strict conformity with the statute; that no Term had been lost, and that the plaintiff in *ca. sa.* had not been injured in any respect.

The first bond was defective in several particulars. It was payable to the Sheriff. It stated, that the defendant was arrested at the instance of Robert H. May & Co., when the *ca. sa.* was in the name of Robert H. May. It was made returnable to the Court next after its date, which was only thirteen days off. It was conditioned for the defendant's appearance to take the benefit of the Acts of the General Assembly for the relief of honest debtors, instead of, to stand to and abide by, such proceedings as might be had in relation to his taking the benefit of the Act of 1823, for the relief of honest debtors.

After argument, the Court held that the bond was void; that the Sheriff was guilty of a voluntary escape, and amenable to the rule for contempt, and overruled every ground assumed by the Sheriff; and to this decision of the Court the Sheriff filed his bill of exceptions, assigning the same as error.

MCKENZIE & WARD; and MILLERS & JACKSON, for plaintiff in error.

C. H. SHOCKLEY, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Ought the rule *nisi* against the Sheriff, to have been made absolute?

It ought not to have been, if the escape was a *negligent* one. This is not disputed. The Court below considered the escape to have been, not a negligent, but a voluntary, one.

If we go by what is said, and, perhaps, what is decided, in *Colley vs. Morgan*, (5 Ga. 185,) we must say, that the escape was no more than a negligent one. And we incline to think, that it was no more than a negligent one. The reason why the Sheriff let the defendant go at large, was, not that he *wished* him to be at large, but, that he felt himself *constrained* by the law, (mistaken though he might be,) to let him go at large—that law which he had to interpret for himself.

Would such an escape as this, amount even by the common law, to a satisfaction of the debt? Hardly.

No case was cited in which, an escape in such a case as this, was held to be voluntary.

But say that this escape was voluntary, does it follow that the rule should have been made absolute?

The reason why a voluntary escape subjected the Sheriff, by the common law, so absolutely to the payment of the debt, was, that by a voluntary escape, the *ca. sa.* became satisfied, or, at least, *functus officio*, so that the Sheriff could not re-arrest the defendant under it. *Watson Shff.* 141.

But the common law in this respect, has been changed by our statutes.

An Act of 1811 says, that both the *fi. fa.* and the *ca. sa.* “shall be of full force until satisfied, without being obliged

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to be renewed on the Court roll from year to year." *Cobb, Dig.* 510.

An Act of 1843, says, that "in any case where a debtor has been arrested under an execution against the body, and is afterwards discharged from such imprisonment, either by the authority of the plaintiff or otherwise, without the debt being paid, that such arrest and discharge shall not operate as a satisfaction of the debt, but the debtor's property shall be liable to the judgment as though no arrest had been made." *Id.* 515.

This repealed the common law rule which says, that a liberation of the arrested debtor shall be a *satisfaction* of the *ca. sa.*

And the effect of it in the present case, was, to prevent the *ca. sa.* from being "satisfied" by the act of the Sheriff in letting the defendant go at large on receiving from him the first bond.

The *ca. sa.* thus being prevented from being "satisfied," by this act of the Sheriff, the statute of 1811, aforesaid, came in, and said, that the *ca. sa.* should be "*of full force until satisfied.*" And if the *ca. sa.* was still of force after this act, then the Sheriff had the right to re-arrest under it.

Is it true, that the *latter* words aforesaid, of the statute of 1843, would, if they were all, authorize an implication, that satisfaction was to be sought for only out of the debtor's property? But those words are not all; there are the words of the statute of 1811, which are, that the *ca. sa.* "*shall be of full force until satisfied;*" and we are not allowed to make a statute by implication repugnant to another statute, if there is not some great necessity for doing so. There is no such necessity here.

These things being so, we think, that the Sheriff had the right to make the second arrest, and to take the second bond; and, that as he acted throughout in good faith, and under legal advice, and, as no Term of the Court was lost by his mis-

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take, the rule against him should not have been made absolute.

Judgment reversed.

SIMEON WARNOCK propounder, plaintiff in error, vs. **GREEN G. WATSON**, et al. caveators, defendants in error.

Persons who are cited in the Court of Ordinary, become parties to the proceeding, and when there is an appeal in that proceeding, they are carried up as parties to the appellate Court, though they may not be the actual appellants: consequently, it may happen, that the appeal will be good as to them, when it will not be good as to the actual appellants.

Caveat, from Burke county. Decided by Judge HOLT, April Term, 1858.

This was an appeal by Green G. Watson, caveator, from the following order and judgment, passed by the Ordinary of the county aforesaid, at the January Term, 1858, of his Court:

"Upon the application of Simeon Warnock, of the county of Burke, to set up a nuncupative will of Everett Tindall, late of said county deceased, and to have granted to him letters testamentary thereon, it appearing to the Court by the testimony of Dr. Charles A. Thompson, James M. Sheppard and William Jenkins, that Everett Tindall aforesaid, did, on or about the fifteenth day of November, in the year of our Lord eighteen hundred and fifty-seven, in the time of his last sickness, and in the house of his (the said deceased's) habitation, he being then and there sound in mind, pronounce, in the presence of said witnesses, his nuncupative will, in the words following:"

"I call upon you all to bear witness, it is my wish and

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will, if I die, that all my property shall go to my child: I want my cousin, Simeon Warnock, to be my Executor, manage my affairs, pay my debts, and save what he can for my child. I want him to take my child home, raise it, and manage the property for it. All of you bear witness that this is my last will."

"And it further appearing to the Court that the said deceased left no widow, and only one child, a girl, named Martha Lurania, to whom process has issued, calling upon her to contest the setting up of the said nuncupative will, if she desires. It is therefore, ordered, that the said testamentary words be set up as the nuncupative will of deceased, that they be admitted to probate, and that letters testamentary thereon be issued to Simeon Warnock, the executor, therein named, in terms of the statute in such case made and provided."

Upon the calling of the said cause in the Court below, the propounder of said will, by his attorneys, moved to dismiss the appeal of the said caveator, on the following grounds:

I. Because the appeal had not been legally transmitted by the Ordinary to the Clerk of the Superior Court; and because there was no evidence before the Court that any appeal had been entered.

II. Because the said Green G. Watson was not a party interested in the said proceeding, and had no right to caveat the same; nor to appeal from the said judgment, for the following reasons:

1st. Because he was not named in said will, either as executor or legatee; and his interest in said will, or in the estate of said deceased, did not appear either by his own oath or any other proof.

2d. Because his caveat does not disclose such an interest as entitled him to be heard in said cause.

3d. Because he had no interest under said will; was not next of kin to the deceased, and would not have been a distributee of the estate of said deceased if he had died intestate.

4th. Because none but the widow, or next of kindred of the testator are allowed to contest the setting up and probate of a nuncupative will.

With regard to the interest of caveator, it appeared that Everett Tindall died, leaving no widow, and only one child to-wit: Martha Lurania, an infant about six or seven years old; that Green G. Watson was the maternal uncle of the child; Simeon Warnock, the cousin of the testator; and that no affidavit by the said caveator of his interest had been filed with the Ordinary, or in this Court, nor did any other interest appear than his said relationship.

After argument the Court decided against propounder on the motion to dismiss, for irregularity in the transmission of the appeal. The Court further decided that Green G. Watson was not entitled to be heard in the Court of Ordinary, nor in this Court, in these proceedings, because he was not a party interested therein, and dismissed his appeal.

But it appearing to the Court, during the argument, by the papers in the cause, and the admission of counsel, that the said minor child had no guardian, and that at the trial before the Ordinary of said cause, no guardian, *ad litem*, had been appointed for the said child, the Court thereupon decided that inasmuch as the said child's interest had not been represented in the said proceedings before the Ordinary, that they were *ex parte*, irregular and wholly void, and should be remanded to the Ordinary for a re-hearing. Whereupon the Court passed the following order:

"It is ordered by the Court that Malcome D. Jones be and he is hereby appointed guardian *ad litem* of Martha, infant daughter of the testator. That the cause be remanded to the Court of Ordinary, and that the Court of Ordinary be directed, and it is hereby directed to hear the application of the propounder of said nuncupative will, and make such order in relation to said will, as it may deem right according to law."

Whereupon the counsel for the propounder excepted, to so

much of the opinion and judgment of said Court, as decided that the said proceedings before the Ordinary and the judgment therein were irregular and void, and that the said cause should be remanded to the said Court of Ordinary for a rehearing.

JONES & STURGES, for the plaintiff in error.

BENNETT, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The first ground of the motion to dismiss the appeal, was abandoned in this Court.

Was the Court below right, on the other grounds, in dismissing the appeal, and in remanding the case to the Court of Ordinary?

We think not.

Process had issued to the infant from the Court of Ordinary, calling upon her to contest the nuncupative will, if she desired to do so.

She, therefore, was a *party* to the cause in the Court of Ordinary.

After the decision of the cause in that Court, Green G. Watson came before the Ordinary, and, as the "next of kin" to the infant, demanded an appeal from the decision; and an appeal was granted to him, and the case was transmitted to the Superior Court.

There was an appeal, then, regularly received by the lower Court, and regularly transmitted to the higher Court.

An appeal carries up the whole case. Therefore, it must carry up all the parties to the case.

This appeal, then, in carrying up this case, carried up the infant, as one of the parties to the case.

The case, including the parties to it, being thus regularly carried up, the appellate Court obtained *jurisdiction* of the case including the parties to it.

These things being so, suppose it true, that, as Watson had no interest, the appeal ought to have been dismissed as to him, did it thence follow, that it ought to have been dismissed as to the infant? Certainly not. *She* had an interest. She had the only interest; and dismissing the appeal as to her, would not have been determining the appeal "according to law and right," the mode, according to which, the statute says, that appeals from the Court of Ordinary, must be determined. *Pr. Dig.* 238.

We think, then, that the Court ought not to have dismissed the appeal as to the infant, but only as to Watson; and, that, after dismissing the appeal as to Watson, the Court should have appointed a guardian *ad litem* for the infant, and have let the case proceed in her name, as the appellant.

Perhaps, the appointment of Jones, as guardian *ad litem*, may still answer, so far as the appointment of such a guardian, is concerned.

As to the main matter, however, we see no necessity for remanding the case to the Court of Ordinary. We think, that the case may be well perfected in the appellate Court; and that both right and expediency require, that it should be perfected there; and then, that it should proceed to an end in regular course.

Judgment reversed.

McDONALD, J., dissenting.

This cause comes up on exception taken to the judgment or order of the presiding Judge in the Court below, appointing Malcolm D. Jones, guardian *ad litem* of Martha, the infant daughter of the testator, and ordering that the cause be remanded to the Court of Ordinary, and that the Court of Ordinary be directed to hear the application of the propounder of the will, (a nuncupative will) and make such order in relation to said will as it may deem right according to law. Sim-

eon Warnock moved before the Ordinary to set up a nuncupative will of Everett Tindall, deceased; Green G. Watson caveated the application. The will was established and the caveator appealed. In the Superior Court a motion was made to dismiss the appeal, and the appeal was dismissed. No exception was taken to that decision. But the presiding Judge pronounced the judgment or order above stated, which is assigned as error, and this Court unanimously reverse that judgment. But this Court send back their judgment of reversal with instructions to the Court below, the amount of which is, that the cause shall be reheard before the Ordinary, and that a guardian *ad litem* shall be appointed for the infant. I cannot concur in the authority of this Court to give instructions, in such a cause, to the Court below. The only jurisdiction which the Superior Court had of the cause, was given to it, by the appeal which was entered from the decision of the Ordinary. That appeal was dismissed. The cause, after the dismissal, was no longer in the Superior Court, and that Court could no more pass an order in respect to it, than it could in any cause pending before the Ordinary. If the order had been passed prior to or simultaneously with the appeal, the effect would have been the same, for the dismissal of the appeal carried with it everything which had been done, and which could not have been authorized, but for the appeal.

The order is nugatory at any rate, in my judgment; for the effect of the dismissal of the appeal, was to leave the judgment of the Ordinary quite as operative and effective as if no appeal had been entered.

The power claimed for this Court to award such order and direction to the Court below, in the premises as may be consistent with the law and justice of the case, cannot, it seems to me, be exercised in this case. There must be a cause in that Court, on which the order and direction of this Court may operate. But there is no cause there. The appeal was dismissed. No error was assigned on the decision dismissing

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the appeal, and without it, this Court could not reverse the judgment of dismissal; and that standing, the case cannot be in the Superior Court.

ELIZABETH M. HOUSE, plaintiff in error, **vs. JESSE HOUSE**,
defendant in error.

A Court has no jurisdiction over a case in which, neither of the parties is, or has ever been, in the State, or is a citizen, or a resident of the State, or the owner of property in the State.

Divorce, from Richmond county. Decided by Judge Holt,
October Term, 1857,

This case was a libel for divorce. The Sheriff having returned that the defendant could not be found in his bailwick and it appearing to the Court that neither of the parties were residents of the State of Georgia, a motion was made on the part of the libellant that the Court would allow service to be perfected by publication.

The Court below refused the motion, and counsel for libellant excepted.

WALKER & ROGERS, for plaintiff in error.

_____, *contra*.

By the Court.—BENNING, J. delivering the opinion.

In this case, neither party was in the State, or was a citizen in, or a resident of the State, or, as far as appears, had property in the State.

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It was, therefore, a case over which no Court of the State, had, or could have, any jurisdiction—a case to which no law of the State could possibly extend.

We think, therefore, that the Court was right, in refusing to “allow service to be perfected by publication.”

Judgment affirmed.

JOHN P. STRINGFIELD, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

An indictment charging the accused with the offence of trading with a slave without written permission from his owner, &c., need not charge the name of the owner or the slave, nor the ownership of the property traded.

Misdemeanor, from Richmond county. Decided by
Judge HOLT, at October Term, 1858.

The indictment charged that the defendant, on the 23d day of December, A. D., 1856, in the county of Richmond “did receive from a certain negro slave, then and there the property of one Mr. Warren, a certain jar containing lard of the value of six dollars, without written permission from the owner, overseer or employer of said slave, or from any other authorized to give such permission, authorizing said slave to sell and dispose of said jar containing lard,” &c.

The defendant was arraigned and pleaded to the indictment. He was tried and found guilty by the jury.

Before sentence on the verdict he moved the Court in arrest of judgment, on the following grounds, to-wit:

1st. Because the indictment is not sufficiently certain to warrant the conviction of the defendant.

2d. Because the indictment does not charge the name of the negro from whom the articles were charged to have been received.

3d. Because the indictment does not charge the name of the owner of the slave, the language of the indictment being, that the defendant did receive from a certain negro man slave, then and there the property of one Mr. Warren.

4th. Because the indictment does not charge that the jar of lard, alleged to have been received was the property of any person.

The presiding Judge overruled the motion, and counsel for defendant assigns error on the three last grounds in the motion, to-wit:

1st. That the indictment does not charge the name of the negro.

2d. That it does not charge the name of the owner of the slave.

3d. Because it does not charge that the jar of lard was the property of any person.

WALKER & RODGERS, for plaintiff in error.

Attorney General, McLaws, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Every ground in the motion in arrest of judgment on which error is assigned, has been decided by this Court. In the case of *Ricks vs. the State*, the plaintiff in error, was indicted for buying cotton from a slave without permission; the Judge of the circuit Court charged the jury that it was not necessary to allege or prove the ownership of the cotton in any person, and this Court sustained the charge. 16 Ga. 600, 603.

Fardy Sweeney was indicted in the Superior Court of Bibb county, for selling and furnishing a slave with spirituous liquors, for the slave's own use, he the said Sweeney not being the owner, overseer or employer of said slave, and not then and

there having the said slave under his custody or care. The jury found him guilty. It was objected to the indictment on a motion in arrest of the judgment, that it did not aver the name of the negro or contain any other allegation by which his identity might be sustained or proved. In delivering the judgment, the Court remarked that it was insisted that unless the indictment had stated the name of the negro and the name of his owner, the judgment would not serve as a bar to another indictment for the same offence. This Court held otherwise. 16 *Ga. R.* 467. These cases settle the points made in this case. It is true that in the case of *Sweeney vs. State*, the indictment charged that the name and owner of the slave were unknown. But the Court decided the case without reference to that allegation. Indictments for larceny must charge the ownership of the property alleged to have been stolen to be in some person, and if the owner be unknown that must be alleged. But that is a rule not without a reason, for the jury on conviction of the accused find all the facts charged and among them the ownership of the property alleged to have been stolen. On conviction of the defendant, the owner, if known, is entitled to have the property restored to him and if he be not known, it goes, in England, to the crown. 2 *East's Cr. Law*, 651. *Larceny and Robbery*, Sec. 88.

In this State every negro is presumed to be a slave and to have an owner, and proof of his color is sufficient *prima facie* evidence of his being a slave and supports that allegation.

Judgment affirmed.

BENJAMIN F. McLELAND, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

If the Court charge the jury in a criminal cause, that if they believe that one of two or more acts, necessary to constitute the offence charged in the bill of indictment be proven, they should find the defendant guilty, it is error.

Adultery, from Scriven county. Decided by Judge Holt, April Term, 1857.

The plaintiff in error in this case was indicted for "living in a state of adultery and fornication" with Marion Scott.

Upon the trial in the Court below, the State introduced as a witness — *Green*, who testified that some time in September or October, 1855, he saw the defendant and Marion Scott lying together in a storehouse of the defendant, under the counter, thinks they committed the act of adultery, they were doing something particular—that defendant had carnal knowledge of and with said Marion Scott. This was in the county of Scriven, State of Georgia. Marion Scott at that time was living in the house with defendant and his wife. Marion Scott, was a single woman. Witness and witness' wife, and Marion Scott, who was his wife's sister, were lying under the counter, when the defendant came in the store and went under the counter to the place where they were lying. That he (witness) believed at the time that defendant was having carnal knowledge, but he did not interfere to prevent it.

John Burcer, testified that the defendant was a married man that he saw him married eight or ten years before, and that his wife was then living.

The State then closed, and the defendant introduced no evidence.

Defendant's counsel asked the Court to charge:

1st. "That under this indictment the defendant must be proved to have lived in a state of adultery and fornication with Marion Scott, and that proof of a single act of adultery only, is not sufficient to authorize a conviction.

McLeland vs. The State.

This charge the Court refused to give, but charged the jury "that although the defendant was indicted for "living in a state of adultery and fornication" yet if they believed from the testimony that the defendant had been guilty of a single act of adultery, they should find him guilty under the indictment."

Defendant's counsel requested the Court to charge.

2d. "That though no witness was put upon the stand to impeach the witness Green, yet nevertheless the jury were not bound to give full faith and credit to his statements. But they can reject the testimony *in toto* if they think proper."

3d. "That the defendant is entitled to the benefit of the reasonable doubts of the jury."

These charges were given by the Court as requested, and the Court further charged the jury. "That the proof must produce in the mind of the jury a reasonable certainty of guilt before they could convict; that if they entertained a reasonable doubt they should acquit."

The jury found the prisoner guilty, and the defendant's counsel filed his bill of exceptions saying that the Court erred in refusing to charge as firstly requested by the defendant's counsel and in charging, as lastly above set out.

GORDON, SINGLETON & WRIGHT, for plaintiff in error.

Attorney General, McLaws; and A. H. H. Dawson, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The act of the Legislature of 1850, *Cobb* 462, prohibits the Judge presiding at the trial of a defendant, in an indictment, from intimating his opinion to the jury in his charge as to the guilt of the accused. If he violates this statute, this Court is required to reverse the judgment.

Under the charges of the indictment in this case, it is ne-

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cessary for other facts to be proven besides an act of adultery, to warrant the conviction of the defendant. We do not say that enough was not proven to justify the verdict of the jury. That is not the question. Did the Court in his charge to the jury intimate an opinion as to the guilt of the accused.

He said to them that if they believed a single act of adultery had been proved, they *should* find the defendant guilty.

Although it was doubtless the intention of the presiding Judge, simply to expound the law, it seems to us, that he intimated an opinion as to the conclusion to which the jury must come, from the finding of one of two or more facts, which are necessary to constitute the offence charged in the indictment. It was the incautious use of a single word by the Court, which could scarcely have misled the jury, but under the positive requirement of the statute and the construction placed upon it in the case of *Ells vs. The State*, 20 Ga. 468, we feel constrained to reverse the judgment of the Court below.

Judgment reversed.

SILENA A. CHURCHILL, et al., plaintiffs in error, vs. DRURY
CORKER, adm'r, &c., defendant in error.

[1.] Where the admission or exclusion of certain testimony cannot affect the real merits of the case, and no new trial is asked, the judgment of the Court below will not be reversed on account of any error as to the competency of said proof.

[2.] The Act prohibiting attorneys from testifying in certain cases, (*Cobb*, 280,) does not apply, where the facts to which the evidence refers, occurred in another case.

[3.] It is not necessary in this State, that any will, whether of real or personal property, should be re-proven when offered in evidence, in any Court in Georgia, as a muniment of title, but a certified copy of the probate, from the Ordinary, under the seal of that Court, makes it testimony.

Recitals in the judgments of the Courts of Ordinary, stand upon the same footing as the judgments of all other Courts of general jurisdiction.

Churchill, et al. vs. Corker, adm'r.

[4.] Calvin B. Churchill conveyed by deed to Benjamin E. Gilstrap and Drury Corker, in trust for his wife, Mary Churchill, certain slaves, to have and to hold said slaves, together with all their future increase, unto his said wife, Mary, her heirs, executors, administrators and assigns forever; the said Calvin B. Churchill reserving to himself the use of the said negroes, during his natural life, free from charge, let, hire or hindrance; the said Calvin B. Churchill to work, use, occupy and enjoy the profits arising from their labor, free from any accountability whatever; but said negroes and their increase subject to any disposition the said Mary Churchill may think proper to make, at or after her death, either by will, deed, or otherwise.

Held, 1st. That by this deed, the marital rights of the husband to the property embraced in it were excluded, except as to the enjoyment of the property during his life. Beyond this, the dominion over the property by the husband was extinguished; his power of alienation was gone; so his power of disposition by will; so its inheritable quality from him. 2d. The wife dying first, she had the right to dispose of her separate property in the slaves by will, which was the remainder after her husband's death. 3d. Had the wife survived the husband, the trust would, *co instantis*, have become executed by the vesting of the absolute title in her. Had she died first, without having exercised the power of appointment, the property would have gone to the husband, as her heir at law. As it now stands, it vests in her personal representative.

[5.] Where a power is given by deed, the Ordinary will grant probate of the will of a married woman, without consent of her husband; and were it otherwise, the assent and acquiescence of the husband will be presumed, after the lapse of many years, the husband never having contested its validity.

[6.] There is nothing in the words of this will, which would prevent the wife from disposing of this property by will, as she has done.

[7.] The administrator with the will annexed, and not the trustees, are the proper parties to institute suit for the recovery of this property.

Trover, from Burke County. Decided by Judge Holt, April Term, 1858.

This was an action of Trover, brought by Drury Corker, administrator, with the will annexed, of Mary Churchill, deceased, against Silena A. Churchill and Almarion O. Corker. Upon the trial, the plaintiff offered in evidence, the testimony of several witnesses, to prove the signatures of Calvin B. Churchill and Rial W. Gilstrap, witnesses, and Drury Corker, J. P., attestant to a certain deed shown. Defendants objected to proof of the signature of Drury Corker, because the deed was made to him, and he was plaintiff in the present action; and the objection was allowed. One of the witnesses furt

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testified, that C. B. Churchill had been dead two or three years; Mrs. Mary Churchill died in 1843 or 1844; R. W. Gilstrap died in 1852 or 1853.

The deed from Calvin B. Churchill to Drury Corker and Benjamin E. Gilstrap, trustees, a copy of which is below, was then offered, accompanied with the certificate of Edward Garlick, Clerk of the Superior Court of Burke county, that it had been recorded. Objected to on the ground that the deed appeared to be attested by Drury Corker, J. P., one of the feoffees, and because there was no proof of delivery. The Court overruled the objection, and held that the deed and certificate were admissible under the Act of 1855 and 1856, and that the execution had been sufficiently proven; to which ruling of the Court defendants excepted. Plaintiff's counsel read to the jury the deed and certificate of the Clerk, as follows:

STATE OF GEORGIA, Burke County.

This indenture, made the fourth day of June, in the year of our LORD, one thousand eight hundred and forty-one, between Calvin B. Churchill, of the county of Burke, and State of Georgia, of the one part, and Benjamin E. Gilstrap and Drury Corker, in trust for Mary Churchill, (wife of the said Calvin B. Churchill,) of the State and county of the other part, witnesseth, that the said Calvin B. Churchill, for and in consideration of the natural love and affection which I have and do bear unto my beloved wife, Mary Churchill, and for divers other good causes and considerations, me hereunto moving, and for the further sum of one dollar, to me in hand well and truly paid by the said Benjamin E. Gilstrap and Drury Corker, trustees as aforesaid, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, released, confirmed and conveyed, and doth by these presents, fully and freely give, grant, bargain, sell, release, confirm and convey unto the said Benjamin E. Gilstrap and Drury Cork-

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[4.] Calvin B. Churchill conveyed by deed to Benjamin E. Gilstrap and Drury Corker, in trust for his wife, Mary Churchill, certain slaves, to have and to hold said slaves, together with all their future increase, unto his said wife, Mary, her heirs, executors, administrators and assigns forever; the said Calvin B. Churchill reserving to himself the use of the said negroes, during his natural life, free from charge, let, hire or hindrance; the said Calvin B. Churchill to work, use, occupy and enjoy the profits arising from their labor, free from any accountability whatever; but said negroes and their increase subject to any disposition the said Mary Churchill may think proper to make, at or after her death, either by will, deed, or otherwise.

Held, 1st. That by this deed, the marital rights of the husband to the property embraced in it were excluded, except as to the enjoyment of the property during his life. Beyond this, the dominion over the property by the husband was extinguished; his power of alienation was gone; so his power of disposition by will; so its inheritable quality from him. 2d. The wife dying first, she had the right to dispose of her separate property in the slaves by will, which was the remainder after her husband's death. 3d. Had the wife survived the husband, the trust would, *eo instanti*, have become executed by the vesting of the absolute title in her. Had she died first, without having exercised the power of appointment, the property would have gone to the husband, as her heir at law. As it now stands, it vests in her personal representative.

[5.] Where a power is given by deed, the Ordinary will grant probate of the will of a married woman, without consent of her husband; and were it otherwise, the assent and acquiescence of the husband will be presumed, after the lapse of many years, the husband never having contested its validity.

[6.] There is nothing in the words of this will, which would prevent the wife from disposing of this property by will, as she has done.

[7.] The administrator with the will annexed, and not the trustees, are the proper parties to institute suit for the recovery of this property.

Trover, from Burke County. Decided by Judge Holt, April Term, 1858.

This was an action of Trover, brought by Drury Corker, administrator, with the will annexed, of Mary Churchill, deceased, against Silena A. Churchill and Almarion O. Corker. Upon the trial, the plaintiff offered in evidence, the testimony of several witnesses, to prove the signatures of Calvin B. Churchill and Rial W. Gilstrap, witnesses, and Drury Corker, J. P., attestant to a certain deed shown. Defendants objected to proof of the signature of Drury Corker, because the deed was made to him, and he was plaintiff in the present action; and the objection was allowed. One of the witnesses fur-

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testified, that C. B. Churchill had been dead two or three years; Mrs. Mary Churchill died in 1843 or 1844; R. W. Gilstrap died in 1852 or 1853.

The deed from Calvin B. Churchill to Drury Corker and Benjamin E. Gilstrap, trustees, a copy of which is below, was then offered, accompanied with the certificate of Edward Garlick, Clerk of the Superior Court of Burke county, that it had been recorded. Objected to on the ground that the deed appeared to be attested by Drury Corker, J. P., one of the feoffees, and because there was no proof of delivery. The Court overruled the objection, and held that the deed and certificate were admissible under the Act of 1855 and 1856, and that the execution had been sufficiently proven; to which ruling of the Court defendants excepted. Plaintiff's counsel read to the jury the deed and certificate of the Clerk, as follows:

STATE of GEORGIA, Burke County.

This indenture, made the fourth day of June, in the year of our LORD, one thousand eight hundred and forty-one, between Calvin B. Churchill, of the county of Burke, and State of Georgia, of the one part, and Benjamin E. Gilstrap and Drury Corker, in trust for Mary Churchill, (wife of the said Calvin B. Churchill,) of the State and county of the other part, witnesseth, that the said Calvin B. Churchill, for and in consideration of the natural love and affection which I have and do bear unto my beloved wife, Mary Churchill, and for divers other good causes and considerations, me hereunto moving, and for the furthersum of one dollar, to me in hand well and truly paid by the said Benjamin E. Gilstrap and Drury Corker, trustees as aforesaid, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, released, confirmed and conveyed, and doth by these presents, fully and freely give, grant, bargain, sell, release, confirm and convey unto the said Benjamin E. Gilstrap and Drury Cork-

Churchill, et al. vs. Corker, adm'r.

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er, trustees as aforesaid, the following negro slaves, to-wit: *Ancil, Tom, Cillar, Hetty, Love, Alfred, Emily, Celia, Amanda and Winney.*

To have and to hold, said negro slaves, together with all their future increase, unto her, the said Mary Churchill, my beloved wife, and to her heirs, executors, administrators and assigns forever. Provided, nevertheless, that the said Calvin B. Churchill reserves to himself the use of said negro slaves during the term of his natural life, free from any charge, hire, let or hindrance whatever; but is to work, use, occupy and enjoy the profits arising from their labor, free from any accountability whatever, but said negroes and their increase, subject to any disposition she, the said Mary Churchill, may think proper to make at or after her death, either by will, deed or otherwise.

In witness whereof, the said Calvin B. Churchill hath hereunto set his hand and affixed his seal the day and date first above written.

CALVIN B. CHURCHILL, [L. S.]

Signed, sealed and delivered in presence of test,

WILLIAM KILPATRICK,

R. W. GILSTRAP,

DRURY CORKER, J. P.

Recorded 5th September, 1842, Record Book, Deeds No. 8, Folio 477.

E. GARLICK, *Clerk.*

Jacob Chance testified: That he was present when the deed shown him, and which had just been read, was delivered and executed; it was at Mr. Churchill's house and was delivered to Benjamin E. Gilstrap; it was in 1841; the witnesses, the trustees, the maker, Mrs. Mary Churchill and himself were present; Mr. Churchill handed it to B. E. Gilstrap, and said, 'here!' That he has not seen the deed from that time until to-day; that he believes the paper he holds in his hand is the identical paper he saw executed, from the signatures of the parties that signed the deed. That he lived

with Calvin B. Churchill from January to first part of June, 1841, as overseer; he had and has worked there before and since. That he never saw but one deed made by Churchill to his wife, and attested as this one is, delivered; plaintiff told me since the last Court that he had found the old deed; John S. Byne had sent it to him; plaintiffs counsel asked witness through whom C. B. Churchill had derived the property in dispute. Defendant objected, because irrelevant—objection overruled and defendant excepted.

Jacob Chance further testified: That Churchill derived the negroes through his wife; that old man Gilstrap, her father, left them to her.

Plaintiffs counsel then offered copy will of Mrs. Mary Churchill, and affidavit of Thomas Cates to same, as follows:

STATE OF GEORGIA, } *In the name of God, Amen! I*
 Burke County. } *Mary Churchill, of the State of*
 Georgia, and county of Burke, being weak of body, but of
 sound, disposing mind and memory, do make, ordain and
 publish this, my last will and testament in manner and form
 following, that is to say:

Item First: I recommend my soul to Almighty Gon.

Item Second: If the child with which I am now pregnant should be born, and lives, I give and bequeath unto said child all the negroes named in the deed made from Calvin B. Churchill, my husband, to myself, together with all their future increase. Provided if the said child should be a male, and dies in its minority—or should it be a female, and dies in its minority, or without intermarrying—then and in that case I give and bequeath the whole of said negroes embraced, together with all their future increase to my beloved brother Ryal W. Gilstrap; but in case the said Ryal W. Gilstrap should die without a lawful child or children, then and in that case it is my wish and desire that the whole of said negroes should be equally divided between my brother Benjamin E. Gilstrap, Sarah Clinton, Julia Clinton, DeWitt Clin-

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ton, and Katharine Clinton, my sister Angelina Lanier's children by her former husband, Lawson Clinton, to be equally divided share and share alike.

Item Third, and last. I do hereby appoint my brothers Benjamin E. Gilstrap and Ryal W. Gilstrap, the executors of this my last will.

In witness whereof, I have hereunto set my hand and seal, this 20th September, 1842.

MARY CHURCHILL, [L. S.]

THOMAS CATES,
JOSEPH CATES, Sen.
DRURY CORKER, J. P.

STATE OF GEORGIA, } In the Court of Ordinary of said coun-
Burke County. } ty, appeared in open Court, Thomas
Cates, who being duly sworn, deposeth and saith, that he
was present and did see Mary Churchill sign, seal and exe-
cute the foregoing paper writing as her last will and testa-
ment; that Drury Corker and Joseph Cates, Sen., signed the
same with this deponent as witnesses thereto in the presence
of the testatrix, and of each other, and that the testatrix
signed said instruments in the presence of the respective
witnesses, and that she was of sound and disposing mind
and memory at the time of the execution of said instru-
ment.

THOMAS CATES.

Sworn to in open Court, Nov. 6th, 1843.

T. H. BLOUNT, Clerk.

Defendant's counsel objecting on the ground that the will was not evidence in said cause, the same being a declaration of title made by deceased.

The Court overruled the objection and allowed the will to be read to the jury, holding that the will was competent evidence for the jury, to show an execution of the power, granted in the

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deed, by Mrs. Churchill. To which rulings of the Court defendants excepted.

Defendants further objected, because the copy will exhibited, showed no judgment of the Court of Ordinary, admitting the same to probate and record, and that in this case the law required the actual execution of the will to be proven by competent testimony, and that the probate of itself would not be sufficient proof of execution, but only of the testamentary character of the paper, even if the judgment of probate were shown. Which objection the Court overruled, to which defendants objected. Col. Thomas M. Berrien offered to prove that the order for record was passed in the Court of Ordinary. Objected to on the ground of his having then been counsel and now was counsel for the estate of Mrs. Mary Churchill. Objections overruled by the Court and defendants excepted.

Col. T. M. Berrien testified that he was the counsel of proponent of the will of Mrs. Mary Churchill, in the Court of Ordinary when the same was probated; that he took, and the Court passed, an order for record in the usual form and wrote the affidavit; that he had, he thought, seen the said order upon the minutes of the Court of Ordinary; that he believed the minutes of said Court had been destroyed by fire previous to year 1849; those subsequent to 1849 were preserved; the minutes, with all the records of said Court, were destroyed at the burning of the Court House on 24th January, 1856, he believed, as they had not, been found since said last mentioned time; said will was proven in 1843, and he thinks a short time after Mrs. Churchill's death.

Ja's F. Navy testified, that the records and papers of Court of Ordinary had been destroyed, except the minutes since 1849.

Plaintiffs put in evidence the following order of Court of Ordinary, defendants objecting to the recitals in said order. The Court admitted the order, to which defendants excepted.

GEORGIA, }
 Burke county, } WAYNESBORO', Monday, Nov. 5th 1855.

The Court met pursuant to adjournment. Present his

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Honor. Edward Garlick, Ordinary. The will of Mrs. Mary Churchill having been proven in due form of law at November Term of the Court of Ordinary for Burke county, for the year eighteen hundred and forty-three, and an order taken for recording thereof, but the clerk of said Court having failed to record said will, it is on motion of Berrien & Jones, counsel for the executor, Benjamin E. Gilstrap, who was the executor of said Mary Churchill, ordered, that the aforesaid will be recorded now for then.

Thomas M. Berrien, Esq., testified, that Benjamin E. Gilstrap was dead, and he thought Mrs. Mary Churchill died in 1843. William Moore and Simeon Warnock testified that they were present when plaintiff demanded the negroes of defendant; no negroes were named, but they understood it was the negroes now in dispute. Defendants refused to deliver them up, saying they would hold them till they could legally deliver them. Stephen A. Corker, testified that he was the son of Silena A. Churchill; knows the negroes, &c., that the children are the increase of the original negroes; and proves what are their ages, yearly hire and expenses.

Plaintiffs closed their case and defendants offered no testimony.

The cause being closed, counsel for defendants requested the Court in writing to charge: "That Calvin B. Churchill had the right, in making this deed, to use words which would defeat the right given to his wife to make a will, and that if she or the trustees accepted a deed of this kind, she or they received it as it was drawn, and that no title would pass under such a deed. That a separate estate in the wife is not created by the deed made by Churchill. That the estate of the wife is a vested remainder in fee. That the power attempted to be conferred is included in the fee, and therefore nugatory, or it is in restriction or qualification of the fee, and therefore void. That the estate of the wife being a remainder in fee, not for her sole and separate use, the husband became

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entitled to it, and the plaintiff cannot recover. That when power to devise is given to the wife, a general assent that the wife may make a will is not sufficient, it must be shown that he consented to the particular will she may make, and his consent should be given when her will is proven as a testamentary conveyance. He should be examined before the Ordinary, and until this is done, the paper cannot have the effect and operation of a will. That if a separate estate be created in trustees for the use of the wife, the title is in the trustees, and the plaintiff in this case is not entitled to recover, but the trustees under the deed are. That if the deed from Calvin B. Churchill to his wife, Mary, authorized her to dispose of the property named in the deed, from him to Drury Corker and Benjamin E. Gilstrap as trustees. that in disposing of the same she should have adopted the particular mode or manner pointed out for the disposition of the property: And, further, that if by the terms of the deed she was required to exercise the right at the time named in the deed, then if she made and executed a will at any other time than is named in the deed, that such a will is not valid in law."

"That Calvin B. Churchill had the right to restrict his wife in disposing of the property to a particular form of conveyance, and that in the exercise of the power given her to dispose of the property, he had the right to say that she must dispose of it at the time named in the deed, namely, '*at or after her death.*' That if these words are in effect '*contradictory,*' because Mary Churchill could not dispose of the property '*after her death,*' that notwithstanding this she could have made a will in her '*last illness,*' and that this construction should be placed on the words referred to. All of which requests to charge, the court refused, but on the contrary charged the jury:"

"That the effect of the deed is to vest the title to the slaves in the trustees upon the trusts declared in the deed. That the legal construction of the deed was an estate in the trustees

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for the use of Calvin B. Churchill for his life with remainder in fee to Mrs. Mary Churchill (his wife) if she should survive him, with power of appointment by deed, will or otherwise; and should she not survive her husband, then the remainder after Calvin Churchill's life estate, to such persons as she should appoint by deed, will or otherwise. That the power given to Mrs. Churchill by the deed was not inconsistent with the fee, and that the estate was, though not by express words, for the separate use of the wife, and the legal title vested in the trustees. That the power of disposing of the slaves given to the wife is good, and its legal interpretation is to empower her to dispose of them by will, deed or otherwise, to take effect at or after her death, according as she did or did not survive her husband."

"That the will of Mary Churchill, in evidence, is a good execution of the power contained in the deed, and that the trust was now fully executed and the legal title in the plaintiff, and not in the trustees."

The Court further charged the jury that; "there is some proof before you, I believe, to show that Calvin B. Churchill got the property through his wife." To which charge and refusal to charge, defendants excepted.

Defendants objected to the copy will read to the jury going to their room with them, which objection was overruled by the Court and defendants excepted.

The jury brought in a verdict for plaintiff for \$9,220.

And counsel for defendants tender this their bill of exceptions and say:

1st. That the Court erred in admitting in evidence the said copy will of Mrs. Mary Churchill.

2d. That the Court erred in allowing Thomas M. Berrien, Esq., to testify concerning the order of record of said will.

3d. That the Court erred in refusing to charge the jury as requested by defendant's counsel.

4th. That the Court erred in charging the jury as he did.

5th. That the Court erred in telling the jury there was

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some proof to show that Calvin B. Churchill got the property by his wife.

MILLERS & JACKSON; MCKENZIE & WARD, for plaintiffs in error.

BERRIEN & JONES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Whether the testimony of Jacob Chance was, or was not admissible, it is useless to enquire. The merits of this case depend upon the law of the case, arising out of the deed made by Calvin B. Churchill to his wife Mary, and as there was no motion made for a new trial, all minor and immaterial matters should yield to that. What will it profit the plaintiff in error in the end, to carry these outposts, provided the citadel cannot be stormed? How much time and money are wasted in pressing these immaterial points. The most that can be said against this evidence is, that it was irrelevant; and of course the legal rights of the parties growing out of construction of the instrument already referred to, cannot be affected by it.

Was Col. Berrien a competent witness under the facts disclosed by this record? We ask why not? The facts testified to by him occurred in another case, not in this; and previous to his employment in the present case. The witness neither comes within the letter nor the spirit of the statute of 1850, excluding the testimony of attorneys in certain cases. *Cobb* 280.

But reject the evidence of this witness, and still there will be sufficient proof left to sustain the verdict. Navy proves the destruction of the records; and the extract from the minutes establishes the probate of the paper.

It is contended that proof should have been made in the Superior Court of the execution of Mrs. Churchill's will. The

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case of *Rick vs. Cockell* 16 *Ves.* 369, 376, relied on by counsel in support of this proposition was pending in a Court of Equity; whereas the suit before us is an action at law. The rule of evidence may be different. This will [was offered and received in evidence not to show title in Mary Churchill, or the claim of title by her; but to prove, that the power vested in her by the deed of Calvin B. Churchill had been executed. And in this view it was clearly proper. Because, without the execution of the power, the property would have passed to her surviving husband as heir at law. Admitted in evidence, it showed further, and properly too, that the title vested in her by the deed of Calvin B. Churchill had been cast upon the plaintiff as her administrator, with the will annexed.

As to the general proposition, that the will of a married woman, made in the execution of a power, is not competent testimony, without actual proof of its execution in any and every Court where that power and its exercise are called in question; we maintain broadly, that it is not necessary in this State, that any will, whether of realty or personalty, should be proven, when offered in evidence as a muniment of title. But that a certified copy, from the Ordinary, under the seal of that Court, makes it evidence. This results necessarily from the fact, that by law, Courts of Ordinary in Georgia, are clothed with original, general and exclusive jurisdiction, except by appeal, over testate and intestate's estates. And are also Courts of record. It is here, that the validity of wills must be tried and established. In this case, the extract from the minutes of the Court demonstrates, that the Ordinary did pass judgment upon this paper, ordering it to be recorded, and the copy is certified by the Ordinary. It being in proof, that both the original will and record were burnt after probate; the certified copy obtained before the burning is good, as secondary evidence. 1 *Wms. on Ex'ors.* 157, 158, 159.

Again it is objected, that the recitals in the order of the

Court of Ordinary offered by plaintiff below, were not evidence against the defendants. The judgments of the Court of Ordinary import verity, as much as the judgments of the Superior Court, and are therefore at least presumed to be true, until those who dispute them, can show the contrary.

It is insisted that a separate estate in the wife is not created by the deed made by Churchill, and that the estate attempted to be given, being a remainder in fee, not for her sole and separate use, the husband became entitled to it; and hence the plaintiff cannot recover. We are not prepared to admit, that a separate estate in the wife was not created by this deed. But suppose it did not, a husband may clearly make a gift to his wife, which will be good as against his personal representatives. 1 *Atkin*, 271; 3 *Atkin*, 393, 394; *Ram on Assets*, 213.

In *Hovenden on Frauds*, 271, and *Swinburn on Wills*, part 11, section 9, this doctrine is laid down: Any consent on the part of the husband given after marriage, that the wife may dispose of personalty by will, if such consent rests merely in agreement between the parties themselves, and be not guarantied by bond, may be retracted, at any time before assent given by the husband, to the probate of such will. In the case before us, the agreement rested in and was guarantied by a solemn conveyance from the husband to the wife.

But that is not all. The will of the wife was proven, in November, 1843; the husband not appearing to contest it. The husband died in 1855, more than eleven years after the probate of his wife's will. He never sought to disturb it by calling on the executors to prove it in solemn form or otherwise; nor in any other way seeking its revocation. It is still of force and unrevoked. Nay more; by the Act of 1845, passed ten years before the husband's death, the time within which proceedings for correcting or setting aside any will, or requiring proof in solemn form, may be instituted, is limited to seven years. The husband then having lived ten

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years after the passage of this law, and having died acquiescing in the probate of his wife's will, it is too late for volunteers under him to rise up and attack the probate, directly, or indirectly. The husband's consent will be presumed. The probate is conclusive under the statute against all the world. The effect of the will is the only open question.

For myself, I am free to confess, that I have but little taste, perhaps for want of discrimination, for the nice distinctions that have been submitted in the discussion, as to the nature of the estate given by the husband to the wife, in this property. That she had the power to dispose of it, there can be no dispute; that she has executed this power in a legal way, is equally clear. But she had something more than a mere power of disposition. It was a power coupled with an interest. Had the wife survived the husband, the life estate reserved to the husband having terminated, the whole estate would have vested at once absolutely in her. But the wife dying first, all she could do was to execute the power given to her by disposing of the property which she did by will. None of the views presented by the learned counsel, have caused this Court to hesitate in holding, that the wife had authority under the deed from her husband to execute the power delegated to her, by disposing of the property by will, in the manner she has done. The husband intended by his deed to divest his marital rights over this property, except as to its enjoyment during his life. For this purpose he interposed trustees. For this purpose he invested his wife with the power of disposition. Henceforth he parted with the dominion over this property; retaining the usufruct only; the power of alienation was gone; so too the power of disposition by will; so its inheritable quality passed away from him.

What then, if the Court did refuse to charge, that the wife took a vested remainder in the property, and that the husband thereby became entitled to it; counsel have no reason to complain of the refusal of the Court to charge this; since

the express power to dispose of that remainder, appearing upon the face of the deed, and the execution of the power having been proven, it prevented the husband from taking, whether she had a vested remainder or not.

It is further assigned, as error, that the Court refused to charge, that if a separate estate was created in the trustees, the trustees, should have sued, and not the plaintiff.

Without saying more upon this head, it is sufficient to remark, that upon the death of the wife, the probate of the will and the death of the husband, the property vested in the legal representative of the wife; whenever the remainder vested in one capable of taking and holding, the trust, being *functus*, would cease of course; and no estate whatever remained in the trustees.

Counsel find fault with the Court for telling the jury not very emphatically to be sure, that "he believed there was some proof," that Calvin B. Churchill got the property in dispute by his wife. Chance, one of the witnesses, swore to it, positively; and there was no evidence to the contrary; there was no dispute about the facts; and this was conceded by counsel in arguing before the jury as admitted here. Surely then, the Court did not trench upon the province and privilege of the jury in saying, "he believed" there was some proof upon this very immaterial point. He did not say, that the fact was or was not proven, which by the Act of 1849, is prohibited; but stated merely that there was some proof "he believed" to a certain point. This is not forbidden by the statute.

I fear I shall weary the profession with this case. Some of the smaller grounds, may have been overlooked. Suffice it to say, they are all overruled, and the judgment of the Circuit Court affirmed generally.

Judgment affirmed.

Martin vs. The State.

GREEN MARTIN, plaintiff in error, vs. **THE STATE OF GEORGIA**, defendant in error.

[1.] When two persons are indicted together, and a true bill found against both, but one only is arrested, arraigned, and put upon his trial, a general verdict, "We the jury find the *defendant* guilty," is sufficiently certain as to the individual intended.

[2.] A juror who, while consulting with his fellow-jurors in a criminal case, refers to another offence, alleged to have been committed by the defendant, saying "he is a bad man any how," and especially if he acknowledges that this other imputed crime influenced the jury in convicting the accused, evinces a bias of mind that disqualifies him from serving as a juror.

Murder, from Washington county. Decided by Judge **HOLT**, March Term, 1858.

Green Martin was indicted for murder of his negro.

Upon the trial the following evidence was adduced :

Dr. Lucien Q. Tucker being sworn: I am a physician; I was practicing on the 9th day of May, 1857; I was requested by Mr. Martin to examine the negro boy; this was on the 11th May, 1857. I examined; Green Martin asked himself; I found the boy disfigured by bruises; I had no instruments; I did not probe the wounds; the bruises were on his breast, sides, wrists, and ankles, and his face; I borrowed a pocket knife and cut into the boy's neck, and found a dislocation of his neck; his name was Alfred; he was the property of Green Martin; was taken out of the grave; I suppose a dislocation of the neck caused his death; bruises were severe, and on the side the skin was broken, produced by violence; they were caused by something hard; the appearance of the bruises around the wrists and ankles were caused by a rope; the bone upon which the head rests is called the atlas; it was dislocated; a fall will produce dislocation; the fall must be violent; a fall backwards from a chair has produced it; a jerk may produce it; choking without a jerk will not; the boy was disinterred; does not know how long the boy was buried; judging from the wounds, they appeared to

have been of recent date; suppose the boy's neck had been dislocated; he found that, and knew it was sufficient; the boy was buried in an old field belonging to Thomas Wright, of Washington county, about one mile and a half from the residence of the defendant; the dislocation of the atlas causes death by pushing forward, and presses upon the wind-pipe, and causes suffocation; appeared of recent date—of few days.

Cross.—I was called for a *post mortem* examination; I found him at the grave; the grave yard was a negro grave yard; I saw other graves there; I can't tell how many places the skin was broken in exactly; I remember two, I found one in his side; the body was swollen very little; I can't tell the depth of the bruises from external appearances; the one on the side was cut through the skin; after a dislocation of the neck on the ground, the person could not rise again; witness thinks pushing the bone forward would produce strangling; the witness says that a dislocation of the neck caused the death of the boy. I cannot say that the bruises produced the death; the witness says that the grave did not present the appearance of concealment; he says Mr. Martin asked him to go and examine the boy; it was at the Coroner's request; some person was with Mr. Martin when he asked him, but he does not remember who; the dislocation of the atlas will cut off all connection between the body and brain; all action afterwards would be but spasmodic—death would instantly ensue.

Miss Catharine Martin sworn and says: I am the daughter of Green Martin; I reside at my father's house in the county of Washington; I have resided at home, my father's, ever since the 9th of May, 1857. My father is the owner of slaves; he owned a negro boy by the name of Alfred; the boy is dead. He died on the 9th of May, 1857, at my father's house in the county of Washington, State of Georgia. My father, two sisters, and my brother Godfry and myself were present. My brother Godfry is not present in the coun-

ty. I don't know where he is; I have seen him once since the 9th of May, 1857, on Sunday night week afterwards. Alfred was over twelve years of age at his death; does not know how much over, but between twelve and thirteen. Was in good health up to that time as far as she knew. He was struck three licks with a rope by Godfry about three o'clock P. M. I saw my father choke him about twelve o'clock, no one present but myself. He then threw him on the ground and sat down on him astraddle of him. Short time after he then choked him and threw him down the second time again; my brother Godfry then poured water on him. My father then got off of him, and did not trouble him any more. My father did not sit down on him the second time. I saw my brother Godfry kick him down. The boy then again got up. I have been sworn twice on this case; once by Mr. Daniel at the Coroner's inquest, next time at Dr. McBride's; John Ivy, Henry Wood, Silas Daniel were the Justices. There was a saddle used by Godfry on that occasion; the saddle was put on the negro, my father was sitting present as close as to you (Hook) [distance about 20 feet.] About one half hour after, my father choked the boy down the second time, until my brother Godfry put the saddle on him; the witness did not see the boy during the time; she was in the house, the boy was on his all fours. My brother put the saddle on him and then got upon it; he remained some quarter of an hour, I suppose; he sat upon the boy, but did not make him carry him. My father was present. After the riding the boy carried the saddle into the house by the order of my father, and then returned to the yard. When the boy returned to the yard, I saw my brother Godfry kick him down; my father was sitting on the bed scaffold in the yard, seven or eight feet from my brother. It was between three and four o'clock. One hour before the boy's death, after the boy was kicked down, and he got up and my brother slapped him down, but did not see him or my father strike him with a stick. Witness does not know

what followed immediately. Witness did not see the boy dragged by a rope; he was hit three licks with a rope by her brother. It has been nearly a year since I testified before the Justices, but do not remember testifying to the fact that there was a rope around his body; does not remember seeing a rope around his body one-quarter of an hour before his death. The whipping commenced about twelve o'clock, while my father was sitting on the boy. Did not see him choke him nor strike him. I saw him dead about an hour by sun, near six o'clock. Did not go to the boy, but saw him while passing; he was naked, but she does not know who stripped him. My father did not carry him to the house, but my brother carried him to his mother's house and laid him out. I saw him next morning in his mother's house, but did not examine him. My father and brother did not bury him secretly; they did not request him to be buried secretly. I do not remember to have said that with a rope around his waist he dragged him fifty yards. I came to town with my two sisters and Washington Gilbert on last Wednesday; I have stayed at Mr. Langmade's ever since. I was over twenty years at the time this occurred. Witness saw the boy next morning after his death; she saw no bruises before his death, nor when he was lying in the yard dead. Witness does not remember that her father and brother requested that the boy should be buried secretly, nor any intimation that way. The body was swollen considerably next morning. The boy was buried on the 10th of May, near sunset. Witness, two sisters, James L. Scott, one cousin, and William Dent, and several negroes. My father did not attend, in consequence of sickness; he was vomiting. No one attempted to interfere during the events which she has testified. Her mother was not living. She and her sisters were there, but did not bother them for fear they might bother her.

Cross.—The slaves of Green Martin were not particularly under control of her brother; they all worked together.

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Godfry Martin worked in the field during that year; this boy was one of the hands. Godfry Martin controlled them while in the field. Witness testified that on that day she did not hear the cause of this correction. The cause of the whipping was because he sauced her brother. The boy told brother to kiss his backside; the boy said that he said so. The boy was very saucy and uncontrollable. Her father did not remain long on the boy—one or two minutes. Her father did not appear angry while sitting upon the boy. He used no uncommon violence during the affair. The boy did not complain after he got up. She saw her father sit down on the boy between one and two o'clock; never saw her father touch the boy afterwards. Witness did not hear the boy complain from any injury he had received from Green Martin.

By the State, re-examined.—Witness heard her father and Godfry say at that time, that the offensive words recorded above, was the reason for whipping him. Witness says she does not know whether the whipping a week before was for this offensive language or not. Witness says that the boy was kindly treated, and was a pet negro.

Miss Mary Martin sworn and says: That she is the daughter of Green Martin. She is unmarried, and she lives at her father's, and she lived there on the 9th May, 1857. Her father owned slaves, owned a boy by the name of Alfred. He was thirteen or fourteen years old at that time. Between twelve and one o'clock the affray commenced. I saw my father throw Alfred down; then he choked him whilst he was down. I saw my father throw him down twice and choke him twice. He did not choke him long; five minutes between the choking; the choking did not choke him five minutes. I did mean astraddle the boy. I did not see a saddle on him. I was in the house. My sisters were in the house. I was in the sitting room. I was in the piazza when I saw my father choke Alfred. The piazza is on the back part of the house. When I was in the piazza my sisters were in the room I had just left. I could have seen what

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was going on if I had looked. The boy died about four o'clock in the evening. I saw him after he was dead, about one hour by sun; he was not stripped; he did not look swollen until next day. Does not know whether he looked swelled all over or not. I saw no rope used that day. I saw the boy dragged by brother over the yard by the hand. I did not see my father drag him; my father was present. I did not see the saddle. I saw my brother carry the saddle out and Alfred bring it back. He did not look tired, nor was he weeping as she knows. The boy was lying at the end of the wheat house when she saw him. Godfry put him there, he was dead; he remained half hour. My father was then in the house; Godfrey was in the house part of the time. I saw them attempt to give him mustard, but they could not get it down him. Father got the mustard out of the house; witness gave it to him. Her father did not try to do anything for him. Godfry carried him from the wheat house in his arms. She did not see him drag the boy. My father told the witness to get the mustard for Godfry after he came into the house. Witness says that the boy was behind the wheat house, and that Godfry brought him from that place in front. My father was in the house; does not know how long her father had been in the house before Godfry gave him the mustard. The boy was well at twelve o'clock. Does not know how long. Passed frequently from the yard into the house. She did not interfere; was not particularly afraid of either.

Miss Sarah Martin.—Witness says that she is the daughter of Green Martin. She resides at her father's; she resided there May 9th, 1857. She was in her sixteenth year at that time. Her father had a boy by the name of Alfred. She saw him about 11 o'clock; he was in the yard. He was toting water from the spring, which is one-quarter of a mile from the house. She saw Alfred about two or three o'clock; he was alive, father was sitting on him, and brother was pouring water on him part of the time. She did not



hear him beg for mercy. She was in twenty yards of him. He sat on him about half minute. She did not see her father lying on him as she recollects. She did not see him lying across the middle of the boy. She has testified in this case once at Dr. McBride's, and again at the inquest. She saw a stick used like unto a quilting frame by brother; Godfry used the stick. Father was in a yard or two, does not know whether he, father, was looking or not. The boy had on a shirt; the shirt remained one-half hour on the boy, She did not see a saddle on the boy. Was in the room sick did not pester either because she did not want; knew she was not able to do any good, was sorter afraid of them. Her father said in the kitchen: "Damn him, if he was a mind to lay there and die, let him die." The boy was lying at one end of the wheat house. My brother pushed him down with the stick. He, father, and brother were not raving and cursing at that time; they acted as they usually did. Did not always whip their negroes that way; was not in a riotous manner. After the boy had been pushed down with the stick, he got up, and Godfry kicked him down. The punishment continued three hours; the punishment was continually kept up until the boy's death. She saw him choked once. Godfry and father eat dinner at twelve, commenced whipping after dinner. The boy died about one and half hour before supper. He, father, did not eat any supper, nor Godfry; but she did; they were notified supper was ready. She saw her father choke him once.

Cross.—She did not see her father do anything to the boy after he choked him. The boy looked like he was tired previous to being pushed down; the pushing took place at the wheat house near a post. The ground was tolerable smooth, had not been dug out. Godfey kicked the boy down in the same place that he pushed him down. The boy did not get up after he was kicked down as she knows of.

John A. Bedgood testifies as follows: I was at Mr. Green Martin's about twelve o'clock on the 9th of May, 1857. I

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was at work there. I saw Green Martin on Alfred's back after dinner; Alfred had his clothes on. I left soon to work. Green Martin was choking Alfred while sitting on him; he could not halloo. Godfry Martin was pouring water on the back part of his head and neck. Mr. Green Martin said it was for the purpose. Witness was frightened, and went off to Pricy Martin's to hair some hides. Came back one-half hour by sun; the boy was lying in the yard on his face, naked and dead. The boy looked badly bruised; bruised all over, was bruised on both sides, on his back, breast, face, neck; and his legs were bruised some. The boy was not swollen, looked bruised and scratched up about the neck. Green Martin was in the house when he returned. This happened in the county of Washington, State of Georgia. His body was about ten steps from the place where he saw him in the morning.

Cross.—I am fifteen years old. I live at James Northington's. Smith brought me to town. Witness has testified before in this case. Green Martin said, pour it on his head to keep him from fainting. Folks have talked to me about swearing in the case. I was told to swear the same this time that I swore before Mr. Jordan Smith; Alexander Orr told me to do so. I did not see the boy run and tell Godfry Martin to kiss behind. Witness says he did not say, at the Coroner's inquest, that he saw the boy Alfred run and slap his behind and tell Godfry to kiss it, as he now recollects. Witness does not know how long Mr. Martin lay upon the boy; he left. When he returned he did not go near the boy; he was frightened. Witness did not go in thirty yards of the boy.

By the State.—Witness says that he did not go near the boy that evening; he saw the bruises next morning. He says his face was bruised.

Alexander Orr, Coroner, sworn: Says he was the Coroner at the inquest of the boy Alfred on the 11th May, 1857. I received the information from Mr. Thomas Wright, and

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Jordan Smith, John Anderson, and Gordon Waters; all the gentlemen were living in that neighborhood. He sent Gordon Waters after Dr. Parsons, and then he sent him after Dr. Tucker, who was at the widow Martin's. While he was gone, the prosecutor said that he must get Dr. Parsons. He went after Dr. Parsons himself, but failed to get him.

When the testimony and argument had concluded, the counsel of Green Martin, among other requests, desired his Honor Judge Holt, to charge the jury as follows, in the language of the request, viz:

That if the jury, from the testimony in this case, believe Green Martin was present when Alfred was kicked and pushed down by Godfry Martin, but took no part in kicking or pushing him down with a stick, or striking him with a rope, nor endeavored to prevent these Acts by Godfry, nor apprehended Godfry after he did these acts, and the negro Alfred was dead; this conduct, though highly criminal in Green Martin in itself, will not of itself render Green Martin guilty, either as principal or accessory. Which his Honor declined to do.

The plaintiff in error alleges, that in the argument before and to the jury, the Attorney General and James S. Hook, Esq, associate counsel of the State in the prosecution, each, during their speeches, said distinctly and emphatically that the defendant, Green Martin, rode the boy Alfred as a horse, and that they did so without being arrested or checked by the Court for stating that as a fact which was not in testimony.

The jury charged with the indictment aforesaid against Green Martin and Godfry Martin, returned into Court on the morning of the fourteenth day of March, 1858, with a verdict, which was handed to the Clerk and read by him as follows: We, the jury, find the defendant guilty. Which the counsel for Green Martin desired, when recorded, to be recorded as written. But his Honor the Judge, contrary to the

protest of counsel, directed the jury to amend it by inserting the name of Green Martin.

The counsel of defendant, Green Martin, moved his Honor, Judge Holt, for a new trial on the following grounds, to-wit:

1st. That the jury found the defendant, Green Martin, guilty contrary to law.

2d. That the jury found the defendant, Green Martin, guilty contrary to evidence, and without evidence.

3d. That the jury found the defendant, Green Martin, guilty contrary to the weight of evidence.

4th. That the counsel for the State argued to the jury that the defendant, Green Martin, *rode* the boy Alfred as a horse, and thereby asserted as a fact that which was not in testimony, and thereby greatly colored the acts testified to of said Green Martin having straddled the boy, and impressed, by such statements and argument, the jury with the idea of excessive cruelty having been used by Green Martin in the punishment of his slave Alfred.

5th. That the Court erred in not giving in charge to the jury, as he was desired, the following request: That if the jury, from the testimony in this case, believe Green Martin was present when Alfred was kicked and pushed down by Godfry Martin, but took no part in kicking or pushing him down with a stick, or striking him with a rope, nor endeavored to prevent these acts by Godfry, nor apprehended Godfry after he did these acts, and the negro Alfred was dead, this conduct, though highly criminal in Green Martin in itself, will not of itself render Green Martin guilty either as principal or accessory.

6th. That the jury returned into the Court on the 14th day of March, 1858, with their verdict, and being delivered to the Clerk, was read publicly as follows by him; We, the jury, find the defendant guilty. Which verdict his Honor the Judge directed the jury to amend by inserting the name of Green Martin, contrary to the protest of counsel of said

Green Martin, on the ground stated by them, that as the indictment in the case was against Green Martin and Godfrey Martin, the verdict as published was indefinite as to the person found guilty, and that the verdict, after publication, could not, in an essential matter, be thus amended.

7th. That since the trial of this cause, the defendant, Green Martin, has learned from Richard L. Warthen, Esq., that on Sunday morning, the 14th March, 1858, in returning to Sandersville he met on the way Reuben Osborne, one of the jury in this case; that said Warthen enquired of said Osborne what was the verdict of the jury; and after expressing surprise at it when told what it was, the said Osborne then said, in substance, by way of justification of it, that the beating of Peace by the Martins had an influence on the finding; thus showing that defendant had been greatly prejudiced by an affair for which he had been previously tried and acquitted, and had not had in this case, by reason of such influence, a fair and impartial trial.

And the counsel for Green Martin moved for a new trial on the additional ground of:

8th. Newly discovered evidence since the trial of said indictment, and which was utterly unknown to his counsel until since said trial; to-wit, the testimony of Doctor Nathan Tucker, of Laurens county, by whose affidavit, here shown to the Court, they expect, if a new trial be granted, to prove by him that Green Martin, for the two or three years last past, labored and still labors under a decided monomania; the special delusion being that his slaves entertained the idea of poisoning him, the said Green Martin, and were perseveringly endeavoring to carry it into effect, when there was no foundation or reason for such delusion.

And in support of the 7th and 8th grounds for new trial, offered the following affidavits, to-wit: The affidavit of Richard L. Warthen, Esq., as to the seventh ground, and that of Dr. Nathan Tucker, of Laurens county, and the joint af-

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fidavit E. S. Langmade, Beverly D. Evans, Robert P. Harman, S. B. Jones and Iverson L. Harris, the counsel on the trial of the accused as to the eighth grand.

And the counter affidavit of Reuben Osborn, the juror, is also given.

Copy of the Affidavit of Richard L. Warthen, Esq :

Personally appeared before me Richard L. Warthen, Esq., who being duly sworn, saith that on Sunday last he met Reuben Osborn, one of the jurors who sat on the trial of Green Martin; that deponent asked him what verdict they had found; he replied that they had found guilty; deponent asked him if they had found him guilty of murder; the said Osborn answered yes. Deponent expressed some surprise at it, when the said juror remarked, in substance, by way of justification, that the beating of Peace by the Martins had an influence on the finding.

R. L. WARTHEN.

Sworn to in open Court 17th March, 1855.

L. A. JERNIGAN, Cl'k.

Copy of the Affidavit of Reuben Osborn.

GEORGIA, WASHINGTON COUNTY.

Personally appeared in open Court Reuben Osborn, who being duly sworn, deposeth and saith that he was one of the jurors who found the verdict against Green Martin, tried for murder at the present term of the Superior Court of said county; that said verdict, so far as his own conduct was concerned, was the result of the evidence in the case, and the law as given in charge by the Court; and as far as he knows, this was the case with the rest of the jurors who concurred in said verdict. He was not himself, and knows not that any other of said jurors, was influenced by the conduct of the Martins in the Peace case; that when Mr. R. L. Warthen asked deponent what the jury had done with Green Martin, he replied, we found him guilty. Mr. Warthen said it was

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a bad case, and deponent replied, he is going to call for a new trial, I believe. But I didn't think worth while, according to the evidence in the case. Deponent further remarked then that they, meaning the Martins, must be bad men anyhow, for he had heard that they had beat a man pretty nigh to death last spring. But deponent did not mean to imply that the verdict was influenced by the Peace case at all, for he does not know or believe that any of the other jurors were influenced by it; for himself, he was sure he was not in making up a verdict against said Green Martin. The Peace case was mentioned in the jury room, and this deponent thinks he mentioned it. But he does not believe it had any effect on the verdict, and he is confident his own verdict was made up before he alluded to said case.

REUBEN OSBORN.

Sworn to and subscribed before me this March 19th, 1856

L. A. JERNIGAN, Cl'k.

GEORGIA, WASHINGTON COUNTY.

Personally appeared before me Mr. Edward S. Langmade, Beverly Evans, Robert Harman, S. B. Jones and Iverson L. Harris, who were the Attorneys at Law of Green Martin, and to whom solely the defence of Green Martin was confided, who stood charged by indictment with the murder of his negro boy Alfred, who being duly sworn, depose and say that they had no knowledge or information before or at the trial of said Martin, of the materiality of the testimony of Doctor Nathan Tucker, as shown by his affidavit, nor any intimation or conjecture of the said Green Martin having labored under any mental delusion at any time until since the trial, and that with all the diligence, and vigilance, and care which they severally employed as his attorneys since their respective employments in his behalf, they had not acquired any knowledge, or information, or intimation, which could or did lead them to look for ground of defence in the monomania of defendant until since the trial

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of said Green Martin; and that had they have known or heard of the character of the testimony of Dr. Nathan Tucker, they would have placed the defence of their client upon the ground of mental delusion, and taken prompt steps to procure the testimony of said Tucker.

E. S. LANGMADE,
R. P. HARMAN,
B. D. EVANS,
S. B. JONES,
IVERSON L. HARRIS.

The foregoing affidavit was signed and sworn to before me this 18th March, 1858.

L. A. JERNIGAN, Cl'k.

GEORGIA, WASHINGTON COUNTY.

Before me personally came Nathan Tucker, who being duly sworn, deposeth and saith that deponent is a practicing physician, residing in the neighborhood of Green Martin, of said county, who, on an indictment for the murder of a boy named Alfred, the slave of the said Green, was tried and found guilty at the present term of the Superior Court of said county as this deponent has been informed and believes; that deponent has been for more than twenty years the family physician of the said Green Martin, holding frequent intercourse with him, and well acquainted with him; that until within a few years past the said Green Martin was in the enjoyment of good health, was a sober, orderly and peaceable man, a good citizen, a good neighbor, and by common repute, and in the opinion of this deponent, a kind and humane master; that some years since said Green Martin's health failed; that he became, and ever since has been laboring under a complication of diseases, to-wit, a chronic derangement of the liver and hydrocele, and has been under the treatment of this deponent. That one special effect of the diseased condition of said Green Martin, as before described, was to produce a longing for stimulants, a predispo-

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sition to indulge in the use of ardent spirits; that under the influence of this morbid craving, said Green Martin has contracted the habit of drinking intemperately, and witness states distinctly it is his firm conviction that this habit has been superinduced by disease, and not the diseased condition, in which he is and has been, by intemperance. Deponent, as a doctor of medicine, expresses the opinion that the combined effect of disease and intemperance upon the said Martin has been to weaken, and in a good degree to derange the mind of said Martin; that deponent has had abundant evidence that he has, for two or three years, labored and still labors under a decided monomania, the special mental delusion being an abiding impression on his mind that his slaves entertained a design to poison him, and are perseveringly endeavoring to carry it into effect; and deponent has never been able to discover in the conduct and bearing of the said slaves the least foundation for such apprehension; believes it to be a mental delusion; that said Martin has long been keeping a strict watch upon his slaves—made frequent searches for poison, that he has several times brought to deponent substances found about the premises, and consulted deponent as to their properties, which deponent in every instance found to be free from poisonous qualities, and entirely harmless; that said Martin has been particularly suspicious of a female slave of his own, the mother of the boy Alfred, of whose murder he has been convicted; that under this impression, as this deponent has been creditably informed and believes, said Martin actually kept one of his female slaves in close confinement, though deponent did not actually see her in such confinement; deponent has been wholly unable, by any effort he could make, to divest the mind of said Martin of the delusion under which he was laboring. Deponent further gives it as his deliberate conviction that at the time the boy Alfred came to his death, and for some time previous and since, the said Martin was and has been insane on the subject of the fidelity of his slaves, their disposition

to take his life by poison, and his safety in their hands ; deponent never, for obvious reasons, communicated his opinion on this subject to said Martin or to his family, and does not believe it was known to said Martin or to his counsel at the time of his trial.

NATHAN TUCKER.

Sworn to and subscribed before me this 17th March, 1858.

JAMES F. SMITH, J. P.

After full argument of the grounds of new trial, his Honor the Judge overruled the motion for a new trial in this cause on all the grounds for the following reasons :

The three first because upon a careful review of the testimony, the facts sustain the verdict upon the plainest and clearest principles of law.

The 4th because the fact commented on by the counsel of the State was in evidence by two of the witnesses, and characterized by one of them as riding, and because the counsel for the State was not in conclusion, but might be answered and was answered by counsel for the defendant who had the conclusion, and the testimony was that Godfry Martin sat in the saddle ; it showed the defendant present, and that when the riding was over he ordered the boy to carry the saddle into the house.

The 5th because the Court did give the law in charge to the jury as it was asked for and in the very words of the authority cited, but only refused to give the law as applicable to particular facts, and gave it in charge as applicable to all the facts in evidence.

The 6th because it is not only the right, but the duty of the Court to direct the jury as to the regularity and form of their verdict, and to see that its own minutes and records clearly express what is done in the Court.

The 7th because upon reading the deposition of the juror Osborn, the Court believes him to be an upright and conscientious juror, and that in giving the verdict he was un-

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biased and unprejudiced, and was governed solely by the law and the evidence.

The 8th because that the whole testimony showed that defendant was not acting under the alleged delusion, but was punishing his little slave for insolence.

To this decision of the Court the defendant, by his counsel, excepted.

JENKINS & HARRIS for the prisoner.

ATTORNEY GENERAL for the State.

By the Court.—LUMPKIN, J. delivering the opinion.

Green Martin having been convicted of murder at the March Term, 1858, of the Superior Court of Washington county, moved for a new trial, on eight grounds, as will appear in the Reporter's statement. The first three grounds may be considered together, namely, that the verdict was contrary to law, to the evidence and weight of evidence. The meaning of this is, that the facts in the record, did not justify the jury in finding the defendant guilty of murder. That if he was guilty of any offence, it was involuntary manslaughter.

This case is rather peculiar in several respects. No one doubts, that the boy Alfred came to his death at the hands of Green Martin and his son Godfrey, or one of them. At 12 o'clock on the 19th of May, 1857, he was well. The father and son commenced punishing him for some insolence offered to the son, which was kept up at longer or shorter intervals, until late in the afternoon, covering a period of three hours or more, when the boy expired. And the *post mortem* examination showed that the neck was dislocated, and that there were various bruises on the body and limbs of the boy. The last injury inflicted, as seen and testified to by one of the daughters of the defendant, was a

kick from Godfrey Martin, the son, which brought the boy to the ground, from which he was not seen to rise afterwards.

It is not disputed, that the owner of a slave has the right to correct him for his misconduct. And the mode and measure of punishment must in the main, be left to the master. It must not be cruel and excessive. The manner of punishing slaves, is different with different persons. The *unusual* modes of punishing slaves resorted to by some owners, are not necessarily, nor always the most cruel or severe. It is frequently so in the *seeming* only. From the nature of the case there cannot be any uniform rule prescribed upon the subject. It can hardly be supposed, that the Martin's intended to kill the boy. Still if the circumstances show, that their treatment was such, as was likely to produce death, the law will infer malice and the offence may be adjudged murder.

There is a further difficulty in this case. The dislocation of the neck was unquestionably sufficient of itself to cause instant death. It may have been occasioned by the last kick given by Godfrey Martin. The evidence is not full and satisfactory upon this point.

The proof discloses no positive participation on the part of Green Martin, after the first acts which were testified to, and these could not of themselves have produced death. And yet upon all of these points, there was room perhaps for the jury to have formed an opinion for themselves, touching all these matters. The points to which I have alluded, were involved in just that degree of uncertainty as to restrain a Court from pronouncing authoritatively, the law which should control this case. There were marks of abuse upon the person, particularly the limbs of the boy, as sworn to by Dr. Tucker, which are not explained or accounted for by the proof. Nor is the absence of testimony strange in this case. The daughters and sisters of the actors in this unfortunate affair, were the unwilling, not to say affrighted

witnesses, who alone were present all the time to its fatal termination.

As it is our purpose to remand this cause for a rehearing, we will forbear to comment upon the evidence.

4. As to the alleged misrepresentation of the testimony by the Attorney General, and the associate counsel on the side of the State, we have nothing to add, to what has been heretofore said by this Court. The recital of the testimony may not have been perhaps entirely accurate. The attention of the Court however, was not called to the impropriety complained of; and counsel for the prisoner had ample opportunity in conclusion to set the testimony right.

5. The next error assigned is, that the Court refused to give a legal charge when requested, and in the language of the request. There is some confusion in the record upon this point. The Judge certifies, that he gave the law as asked for, and in the very words of the authority relied on by the counsel. He refused to give the law in charge as applicable to a particular set of facts referred to by counsel, but did instruct the jury, that such was the law as applicable to all the facts of the case. And in this, we think the Judge was right. It is certainly true, that if Green Martin did not participate, so far as the particular facts recited in the request were concerned, he was not guilty, so far as those facts went to establish his guilt, still upon all the facts of the case, he might nevertheless, have been found guilty.

6. As to the complaint, that the Court allowed the verdict to be amended, we are clear, that it needed no amendment; but that it was a legal verdict and sufficiently certain as it was originally rendered.

7. Was Reuben Osborn an impartial juror?

If the statement made by him to Richard L. Warthen, that the previous misconduct of the Martins, had influenced the finding in this case, be true, even as to himself, of course he was not an indifferent, but a prejudiced juror. But try him by his own statement in the exculpatory affidavit which he

filed, and how does he stand? He admits that he said to Warthen in justification of the verdict of guilty which he and his fellow jurors had rendered, that the Martins were bad men *any how*, for that he had heard they had beat a man pretty nigh to death the spring before. But this is not all; he not only acknowledges the unfavorable impression made upon his own mind, as to the Martins, but confesses further, that the Peace case was mentioned in the room, while the jury were engaged in making up their verdict in this case, and he thinks, by himself. By way of explanation, I would remark, that Green Martin had been engaged in a difficulty with a man by the name of Peace, previous to this prosecution. Had not this juror a bias resting on his mind against the accused? We may suppose his own mind to be in doubt as to the guilt or innocence of the prisoner; his previous misconduct comes up to his recollection, and instead of giving to the defendant the benefit of his doubt, he concludes, "he is a bad man any how," let him be punished. And the inveteracy of his prejudice is clearly evinced, by his flinging the Peace case upon the minds of his fellow jurors, when they too, perhaps, were hesitating and halting between two opinions, as to what verdict they should return.

It is true, that Osborn endeavors to expurgate himself. *But we know not ourselves.* Besides, the affidavits of the other jurors were not taken exonerating themselves from the extrinsic influence which was brought to bear upon their minds during their consultation. If the statement be true, that Green Martin was not only acquitted, but fully justified by the Court and the country, for the severe chastisement inflicted by him on Peace, on account of the gross insult offered to the female members of Martin's family, it not only serves to illustrate the impropriety of lugging extraneous transactions into criminal trials, but it goes still further to fix the hostile state of Osborn's mind toward the man, whose life was committed to his hands.

On the ground of the disqualification of Osborn as a ju-

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rer, we shall order a new trial in this case. Justice will not suffer by the delay. Courts generally should imitate the conduct of the Governor and Council of Massachusetts, when the life of Dr. Webster was in their keeping. (I am glad to find something to commend in that ancient commonwealth!) They took time to consider. They calmly and patiently examined every fact and circumstance, and finally, when nothing to extenuate could be found, the culprit was remitted to the dungeon and the gallows. And the whole country felt that the law had been vindicated, and the triumph of justice secured. There should be no hot haste, when the life of a fellow-citizen is involved.

8. As to the eighth ground, namely, the monomania of the defendant, we dispose of it by saying, that much more, we apprehend, will have to be proven, than is foreshadowed in the deposition of Dr. Tucker, before this defence can be made available.

Judgment reversed.

CASES
ARGUED AND DETERMINED,
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
JUNE TERM, 1858.

Present—JOSEPH H LUMPKIN,
CHARLES. J. McDONALD, } Judges.
HENRY L. BENNING,

ABNER C. CONNER, plaintiff in error, vs. THE STATE OF GEOR-
GIA, defendant in error.

- [1.] The rule stated, as to the taking down of testimony in cases of felony; and the use to be made of the same.
- [2.] An indictment or presentment good, although an impossible day be stated, as that on which the offence was committed. At any rate the objection comes too late after verdict.
- [3.] If jurors, to constitute a panel in a criminal case, be summoned by bailiffs, it is good.
- [4.] Where the witness in a criminal case, is unable from his physical condition to speak audibly, his answers, may be communicated in his presence and hearing by a sworn officer of the Court.
- [5.] Although the crime of larceny may be complete as to two persons, as much so as though no other was concerned, still another may be a principal in the same offence.
- [1.] It is not a good ground for the arrest of judgment in a criminal case, that the

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time stated as the time of the offence, is subsequent to the finding of the indictment. BENNING, J.

- [2.] The Sheriff may appoint the balliffs to summon talesmen, on the trial of a criminal case. BENNING, J.
- [3.] Although the indictment is founded on a presentment, it is sufficient, if the jury be empaneled on the indictment alone. BENNING, J.
- [4.] If there is no substantial difference between the presentment, and the indictment, it is a matter of no consequence to the accused, which he is arraigned on. BENNING, J.
- [5.] If a person from debility, is rendered unable to speak loud enough to be heard by the Court and jury, resort may be had to an interpreter. BENNING, J.

Indictment for simple larceny, in Sumter Superior Court.
Tried before Judge ALLEN, March Term, 1858.

At the March Term, 1858, Abner C. Conner was put upon his trial, on an indictment for stealing a negro man slave, the property of John F. Markett.

The special presentment charged the offence to have been committed on the fifteenth day of December, 1857, and is dated September Term, 1857. The bill of indictment is dated September Term, 1857, and charges the offence to have been committed on the fifteenth day of December 1855. The defendant pleaded "not guilty."

It was in evidence from the testimony of John F. Markett that he knew the defendant during the years 1853-4-5, that he owned a boy named Seaborn in 1854, and was in possession of him in the month of December of that year. The boy disappeared the 16th of said month; he searched and advertised for him but did not find him. About the time the boy disappeared, the defendant disappeared from the county. Knew of no intimacy between defendant and the boy, but thinks defendant must have seen the boy at his (Markett's) house.

The defendant confessed to the witness, the boy was brought to him at 26th Justices Court Ground in Sumter county, by James T. Holeman, and a man by the name of Phillips, about the time the boy disappeared, and he carried him away to Selma Alabama, and was to receive two hundred dollars

therefor. Defendant also said he saw Jackson Tiner in Montgomery, Alabama, and the boy was then with him.

Defendant confessed, to Malta Scarborough, carrying the negro off, saying he supposed it was the general belief that he (defendant) had stolen the negro: that the negro had attempted to play him false and he took him to the bluff of Selma, and then that was the end of that damned negro. Defendant was neither drunk or sober, but drinking at the time he told this to Scarborough. He is rendered very foolish and often acts very foolish when drinking, more so than most persons. Witness Scarborough could not tell defendant's exact condition, and whether he was drunk enough to tell the truth or not.

Defendant also told James T. Holeman that he carried the negro Seaborn off, and, that after selling him two or three times he had killed him. This confession was voluntary. Defendant was drinking, but not drunk, and Holeman thinks he knew very well what he was talking about. Holeman, never saw defendant and the negro together, knew nothing of the delivery of the negro to defendant, and this was the first conversation he ever had with defendant on the subject, and he never knew of the matter until he saw the advertisement of John F. Markett in the newspaper.

Jackson Tiner testified that a few days before Christmas in 1854, he was going to Texas and saw defendant in Montgomery, Alabama, when defendant introduced him to a man from Dooly, whom he called Hicks. Hicks was a dark, rather chunky built man, appeared to weigh one hundred and fifty or one hundred and sixty pounds, seemed to have long black hair, and was about the height of Mr. McCay or a little taller. Tiner saw defendant and his companion leave in the Selma stage.

John F. Markett, again testified that the boy Seaborn was a bright mulatto, enough so to nearly pass for a white man, was about five feet ten inches high, and about one hundred and fifty or sixty pounds in weight, was a little taller than

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Mr. McCay. White men who had visited witness Markett's house, had conversed with Seaborn and thought him a white man from his color. He had long black hair. The jury found the defendant guilty; whereupon his counsel moved in arrest of judgment, upon the following grounds.

1st. That the special presentment on which the bill of indictment was founded, was null and void because it charged the offence to have been committed on a day subsequent to the finding of the grand jury; that the special presentment being void, no bill of indictment could be founded thereon, upon which a trial could be had.

2d. That the bill of indictment charges the offence to have been committed, on a different day from that alleged in the special presentment, and that said variance is fatal.

The Court overruled the motion in arrest of judgment and counsel for defendant excepted.

Defendant's counsel then moved the Court for a new trial on the following grounds:

1st. Because the Court after objection by the prisoner, refused to set aside the array of jurors, on the ground that the array was summoned partly by bailiffs.

2d. Because the special presentment on which the bill of indictment was found, was not presented to the jury on the demand of the prisoner, the same being made after the jury were empaneled.

3d. Because the Court permitted testimony to be given to the jury after objection by the prisoner, the jury having been empaneled upon the bill of indictment without the special presentment.

4th. Because the Court refused to hear testimony to show that the prisoner was arraigned on the special presentment, and not on the bill of indictment; and refused the demand of the prisoner, that he be arraigned on the bill of indictment.

5th. Because the Court refused the arraignment as stated in the last ground, and permitted the trial to proceed

after motion by the prisoner to exclude testimony from the jury, until he was arraigned upon the bill of indictment.

6th. Because the Court, after objection by the prisoner, permitted James T. Holeman, to give testimony through an interpreter, the said James T. Holeman, being unable to speak loud enough to be heard by the jury, on account of temporary weakness and debility ; said testimony being communicated to the Court and jury by Col. George M. Dudley, he being called upon by the Court after the witness had communicated it to him in a whisper.

7th. Because the Court refused to have the testimony of said James T. Holeman as taken down by the clerk, read over in his hearing so that he might correct any errors in the testimony as taken down by the clerk. Witness did not demand it nor desire it. The counsel for defendant desired to read the testimony as taken down, which request was granted. The Court did not understand counsel as insisting on its being read to witness.

8th. Because the Court charged the jury, if they believed from the evidence, that defendant took and carried away the negro Seaborn, the property of Markett, from the 26th Court Ground or any other place in Sumter county, with intent to steal said negro, the defendant is guilty. That it made no difference whether others aided and assisted or not, if the defendant actually perpetrated the theft. That if Holeman and Phillips both be guilty, that does not help this defendant.

9th. Because the jury found contrary to evidence and to the weight of evidence.

The Court overruled the motion and defendant excepted. On these several exceptions error has been assigned.

W. B. GUERRY; and N. A. SMITH, for plaintiff in error.

JOHN W. EVANS; and McCAY & HAWKINS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

Overruling as we do, all the grounds in the writ of error, we deem it necessary to notice particularly a few of them only.

The first is, as to the taking down of the testimony as required by law in cases of felony. The old rule was, and we hold it to be the true practice in such cases, to read over carefully to each witness, the testimony as taken down by the amanuensis. If it be correct very well; otherwise let it be made so. If a disagreement takes place, in the course of the trial between counsel or in the jury box, let the witness be recalled if within reach—not to testify anew, but to repeat the evidence given in while under examination subject of course to the recollection of the jury. If the witness has left and cannot be recalled, then read from the written testimony as taken down: It is the next best proof, to that given by the witness on the stand. The non-observance of these directions may or may not be sufficient to require a new trial, according to the peculiar circumstances of the case—ordinarily it is not a good ground of itself.

[2.] As to the multifarious objections to the special presentment and indictment, jointly and separately, it is enough to say, they all come too late. But suppose they did not; and moreover that it be true that an impossible day is alleged in the presentment, as the time when the offence was committed. Have not all the Courts both in England and in this country, settled it so long ago, that the memory of man runneth not to the contrary, that while some day must be stated, any other may be proven? Who does not see, that if it be immaterial to prove the day as charged, that no day or an impossible day will do just as well?

But it will be replied, that it never was decided, but that the time charged must be before the accusation is preferred. And I concede this to be so, at least for the purposes of the argument. But let us look at the reason of the thing. Suppose

the day be laid subsequent to the finding of the grand jury ; it is the same in effect as stating an impossible day, as the fortieth of May, and if it be correct that any day within the statute of limitations and before indictment found will suffice, it is quite clear that no day, or one that is impossible, will do just as well. But we fall back upon the position that this and all kindred objections came too late.

[3.] As to the objection, that the panel of jurors, were summoned partly by bailiffs, the record discloses no facts touching this point except what appears in the motion for a new trial, which was disallowed by the Court. It is true that the law requires that jurors shall be summoned by the Sheriff or his deputy; and if the Sheriff be interested then by the coroner or some other person appointed by the Court. If the bailiffs in this case acted, under the authority of the Sheriff, they were his deputies *pro hac vice*.

[4th.] If the witness, *James T. Holeman* was unable from his physical condition to speak loud enough to be heard by the Court and jury, there can be no reason why his answers should not be communicated by Col. Dudley, an attorney of the Court, in the presence and hearing of the witness.

[5.] The Court charged the jury that if they believed from the evidence the defendant took and carried away the negro, Seaborn, the property of Markett, from the 26th Court Ground, or any other place in Sumter county, with intent to steal said negro, the defendant is guilty, that it made no difference whether others aided and assisted or not, if the defendant actually perpetrated the theft ; that if Holeman and Phillips, both be guilty, that does not help this defendant.

It is objected to this charge, that it is inapplicable to the case, and calculated to mislead the jury. The point taken by the prisoner being, that if the jury believe the crime to have been committed and completed by others before the property was received by the prisoner, then he was only an accessory.

We have examined the testimony carefully and think the

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Court was fully justified in giving the charge which it did : The counsel for the accused had the right to insist upon his view of the law as applicable to the evidence. And for any thing that appears he was permitted to do so. All he complains of is, that the proposition laid down by the Court, the soundness of which is not and cannot be controverted, was calculated to withdraw the mind of the jury from the defence which he set up for the protection of his client. To my mind it is clear that both positions can stand together. The crime may have been completed as to Holeman and Phillips when they carried off the negro, from the custody of his owner, and still Conner have been a principal. If his account of the transaction can be relied on, such was the truth of this case. Be this as it may, the Court charged nothing that was not law ; and law, too, applicable to the facts proven.

If the confessions of the defendant be true, he not only stole the negro, but afterwards drowned him. He is not only guilty of larceny, but of murder also.

Judgment affirmed.

BENNING J. concurring.

Abner Conner was indicted for simple larceny in stealing a negro, and was found guilty. The indictment was founded on a presentment. After verdict a motion was made by him in arrest of judgment. This motion was put on two grounds ; 1st, that the presentment "charged the offence to have been committed on a day subsequent to the finding of the grand jury." 2d, "that the bill of indictment charges the offence to have been committed on a different day from that alleged in the special presentment."

The Court overruled the motion.

I think the Court did right.

[1.] The allegation of time in indictments is, in general, immaterial. The time when an offence is committed cannot, in general, be a matter affecting the real merits of the

offence; "and no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offence charged in such indictment." 2 Sec. 14 *Div. Pen. Code*.

This motion having been overruled, Conner moved for a new trial, which motion was also overruled.

The first ground of the latter motion was, that "the Court after objection by the prisoner, refused to set aside the array of jurors on the ground that the array was summoned partly by bailiffs."

[2.] It is to be presumed, that these bailiffs acted at the instance of the Sheriff; that is, that they were his special deputies. "And the said Sheriffs" "shall have power," "to appoint, as there shall be occasion, one or more deputies." 46, *Sec., Jud. Act of 1799*.

I think that there was nothing in this ground.

The second ground was, that the presentment "was not presented to the jury on the demand of the prisoner, the same being made after the jury was empannelled."

Of what service could the presentment have been to the jury? The variance between the presentment and the indictment as to the time, was not a matter to acquit on. The finding ought not to have been affected by the presentment, if the jury had seen the presentment.

I see nothing then in this ground.

The third ground was, that "the Court permitted testimony to be given to the jury, after objection by the prisoner, the jury having been empannelled upon the bill of indictment without the special presentment."

[3.] I think, that empannelling the jury upon the indictment was quite sufficient; I do not know of any law requiring the empannelling to be, on both the indictment and the presentment, in cases founded on presentment.

The fourth ground was, "that the Court refused to hear testimony to show that the prisoner was arraigned on the special presentment, and not on the bill of indictment; and

refused the demand of the prisoner, that he be arraigned on the bill of indictment."

The fifth ground was, that "the Court refused the arraignment as stated in the last ground, and permitted the trial to proceed after motion by the prisoner to exclude testimony from the jury until he was arraigned upon the bill of indictment."

[4.] I dispose of both of these two grounds in a word. There was no substantial difference between the presentment and the indictment. The variance in the allegation of time, was not a matter of substance. Consequently, it made not the least practical difference to the prisoner, whether he was arraigned on the one or on the other.

The sixth ground was, that "the Court, after objection by the prisoner, permitted James T. Holeman to give testimony through an interpreter, the said James T. Holeman being unable to speak loud enough to be heard by the jury, on account of temporary weakness and debility—said testimony being communicated to the Court and jury by Col. George M. Dudley, he being called upon by the Court, after the witness had communicated it to him in a whisper."

If this ground be good, then the testimony of all persons speaking a strange language as well as of all persons who are mutes, is to be excluded. But we know, that the testimony of these persons, is not to be excluded. That is admitted.

I think that there is nothing in the ground

The seventh ground was, I believe, abandoned.

The eighth ground was, "that the Court charged the jury, that if they believed from the evidence, the defendant took and carried away the negro, Seaborn, the property of Markett, from the 26th Court ground, or any other place in Sumter county, with intent to steal said negro, the defendant is guilty. That it made no difference whether others aided and assisted or not, if the defendant actually perpetrated the

theft. That if Holeman and Philips both be guilty, that does not help this defendant."

I can see no fault in this charge. Indeed, I believe, that this ground was also abandoned.

The ninth and last ground was, that "the jury found contrary to the evidence, and contrary to the weight of evidence."

I think they did not. I think they had an abundance of evidence to warrant their verdict.

The result is, that I think the Court below also did right, in overruling the motion for a new trial.

MCDONALD, J., dissenting.

The plaintiff in error was indicted for simple larceny, and was convicted. He moved in arrest of judgment, and for a new trial. The presiding Judge in the Court below refused both motions, and the defendant below excepted. One of the grounds incorporated in one of the said motions was predicated on the following state of facts :

The plaintiff in error was presented for the offence by the grand jury, who charged it to have been committed in the year 1857. On this presentment the Solicitor General arraigned the prisoner, who pleaded not guilty. Afterwards the Solicitor General made out an indictment, charging the offence to have been committed in the year *one thousand eight hundred and fifty-five*, and transferred to it, without the consent of the prisoner or his counsel, the arraignment and plea made on the presentment, and refused to arraign the defendant on the indictment thus made out.

There was certainly no issue made up, in fact, between the State of Georgia and the prisoner on the indictment on which he was put on his trial. The Solicitor General had transferred and put on it an arraignment made on another accusation of the grand jury. It was not identical, for the offences are charged to have been committed in different

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years. It is said, that though a day and year must be alleged in every indictment, time is not material. It is true that the Solicitor General may generally prove a day different from that laid in the indictment, but still "the time must be stated with such certainty, that no doubt can be entertained as to the period really intended." 1 *Chitty's Cr. Law* 218. It is therefore bad "to state the crime to be committed on the feast of St. Peter, because there are two feasts of that name, and both have additions to distinguish them. *Ib.* If the grand jury in England had charged a crime to have been committed on one of these feasts, could the attorney for the crown make out an indictment thereon, and insert the other, provided the statute law of that country was like our own?

The prisoner not having been arraigned on the indictment, he was deprived of a most important legal right, that of demurring to the indictment, pleading to the jurisdiction of the Court, in abatement, or of filing a special plea in bar. It certainly, according to my judgment, would have been a good plea that no accusation had ever been made against him by the grand jury, for the offence charged in the bill of indictment. Before the contrary can be held, it must be maintained, that if the attorney for the State have two indictments against the same prisoner for horse stealing, both found by the grand jury at the same term of the Court, one for stealing a horse in 1855 and the other for stealing a horse in 1857, he may sustain the latter by proof of the stealing in 1855, and the former by proof of the stealing in 1857. If an innocent person were thus accused, such a proceeding would be most oppressive, and might lead to his unjust conviction.

The grand jury in this case,¹ accused the prisoner with having committed the offence in 1857. He was arraigned, and pleaded not guilty to the accusation, and when put on his trial, he finds himself charged by the Solicitor General with having committed an offence two years before, in re-

spect to which there is no accusation of the grand jury, and to which he had never pleaded.

I cannot give my sanction to the proceeding, and think the judgment of the Court below ought to be reversed.

THOMAS GOLDEN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] When an escape by the prisoner is put in evidence by the State to raise the presumption of conscious guilt, it is competent for the prisoner to rebut it by showing that it was attributable to the fear of serious personal injury from the friends of the deceased, and not from a consciousness of guilt.
- [2.] It is not error in the Judge to say I "apprehend" the rule of law to be this. It being synonymous with understand, conceive, believe.
- [3.] To tell the jury, after charging the law in a criminal case, that they should not differ from the Court on slight or trivial grounds, but should be "clearly satisfied" that the Court was *wrong* before they did so, is objectionable.
- [4.] One may kill another against whom he entertains malice, and yet not be guilty of murder.
- [5.] There can be no murder without malice, express or implied. A homicide may be reduced to manslaughter where no actual assault has been committed on the person of the defendant; and where no attempt has been made to commit a serious personal injury upon the accused.
- [6.] Drunkenness cannot excuse crime; modern decisions go so far as to hold that drunkenness may be considered on the question whether the prisoner was excited by passion or actuated by malice, in committing a homicide.
- [7.] To justify taking human life, the law makes no discrimination in favor of a *drunkard* or a *coward*, or any *particular individual*; but the circumstances must be such as to justify the fears of a *reasonable man*.

Murder, from Marion. Tried before Judge WORRILL, March Term, 1858.

Thomas Golden was put upon his trial for the murder of Nicholas Jordan, and found guilty. Whereupon his counsel moved for a new trial upon the following grounds:

1st. Because the Court erred in refusing to let defendant prove by John Mathews, a witness who had been sworn for the State, that John Eidson said, on the evening of the homicide, that he was the whole cause of it.

2d. Because the Court erred in refusing to let the defendant prove by John Hanks, State's witness, that after he had arrested prisoner, one John Eidson made an attack on prisoner with a knife.

3d. Because the Court erred in its charge to the jury: "You having heard the evidence and the argument, it becomes my duty to give you in charge the rules of the law, by which I apprehend you are to be governed in the decision of the case."

4th. Because the Court erred in its charge to the jury, "that it is the right of the jury to differ with the Court in its construction of the law, but such difference should not be placed upon light and trivial grounds; you should be clearly satisfied that the Court is wrong before you do this."

5th. Because the Court erred in charging the jury as follows: "Though voluntary drunkenness is no excuse for the commission of a crime in a prosecution for murder, where the question is whether the act was done in a sudden heat of passion, intoxication is a circumstance proper for the consideration of the jury."

6th. Because the Court erred in refusing to charge the jury: "If they believe, from the evidence, that Golden killed Jordan through cowardice, alarm, or fear that great bodily harm or injury was about to be inflicted upon him, then he is guilty of neither murder nor manslaughter, but that he killed him in his own defence."

7th. Because the Court erred in refusing to charge the jury as requested by the prisoner's counsel, "that a man may kill another against whom he has malice, and yet not be guilty of murder; therefore, if the jury believe, from the evidence, that Golden had malice against Jordan, and that Jordan pursued and sought a difficulty with him under such

circumstances as to create apprehension on the part of Golden that a serious bodily harm was about to be perpetrated upon him, then the killing is to be referred to this, and not to malice, and he is not guilty of murder."

8th. Because the Court erred in refusing to charge the jury as requested for the prisoner: "If the jury believe, from the evidence, that the prisoner was very drunk for the purpose, or as an excuse to take the life of Jordan, and that being in a state of intoxication, and very drunk, killed Jordan through cowardice, alarm, or fear that a great bodily injury was about to be inflicted upon him, then he is not guilty of murder."

9th. Because the Court erred in refusing to charge the jury as requested, "that if they believed, from the evidence, that Golden was very drunk, and that in this condition several persons pursued and sought a difficulty with him, it is proper that said drunkenness shall be taken into consideration, and that they shall enquire whether a man in this condition would not sooner apprehend felony or serious bodily harm or injury about to be done him, than if he had been sober, and if they shall so believe, that the killing is to be referred to this, and not to malice or any purpose to kill, and he is not guilty of murder."

10th. Because the Court erred in refusing to charge the jury as requested by prisoner's counsel: "If the jury believe, from the evidence, that the prisoner fired the pistol, and when he did so acted under reasonable apprehension that serious bodily harm or injury was about to be done him, he cannot be guilty of a higher offence than voluntary manslaughter."

11th. Because the Court erred in refusing to charge, "if the jury believe, from the evidence, that the gun or pistol shot wound received by deceased produced his death, and if the jury have a reasonable doubt upon their minds as to whether Golden discharged the gun or pistol which inflicted

and the wound upon deceased, then they must give the prisoner the benefit of the doubt, and find him not guilty."

19th. Because one of the jurors, Slaughter, who tried the prisoner in said case, stated to Bailly R. Gill, at the house of N. H. Tullis, on Tuesday before the trial, that he had been summoned as a tales juror in this case, and if he was taken on the jury he would hang the prisoner or stay there until the hairs of his arse dragged the ground; the said Slaughter not being a fair and impartial juror, and had prejudice and bias resting upon his mind against prisoner, and his mind was not perfectly impartial between the State and the accused, the same not being known to the prisoner and his counsel or either of them before the trial of said case: and in support of this ground, affidavits of Gill, the defendant, defendant's counsel, Solomon Welch and J. D. Walker, were filed.

The Court overruled the motion, and defendant's counsel excepted, and assign error.

H. HOLT; and M. BLANFORD, for plaintiff in error

SOLICITOR GENERAL, OLIVER; and THOMAS SLOAN, for defendant in error.

By the Court—LUMPKIN, J. delivering the opinion.

The defendant in this case was convicted of murder, and having been refused a new trial in the Court below, he has prosecuted a writ of error to obtain one in this Court.

Some of the grounds occupied in the rule for a new trial, have been abandoned on the argument here; and as to some of the rest, we deem it unnecessary to notice. It is but a repetition of the same objection. We propose to consider the material questions only.

[1.] It is in evidence that after the homicide was committed and Golden arrested, he made his escape, and was found crouched under a fence, in the immediate neighborhood.

And this flight, it is contended, on the part of the State, indicated a consciousness of guilt. To rebut this presumption, it was proposed by the prisoner's counsel to prove that a violent assault was made upon the accused, by one of the party, before he fled. And this testimony was rejected.

The point in this case is not very material any way; but as the State deemed it of sufficient importance to prove the escape, it would seem proper to allow the accused to account for it as he proposed to do; and to show that it originated in fear of injury from the surviving companions of the deceased, and not from any consciousness of guilt. At any rate, it was a proper matter to be submitted to the jury.

[2.] As to the complaint against the use of the word "apprehend," we see nothing in that. "My duty," said the Judge, "is to give you in charge the rule of law, by which I apprehend"—that is, understand, conceive, believe—"you are to be governed in the decision of this case."

[3.] The next part of the charge we think is objectionable. While the learned Judge admits that it is the right of the jury to differ from the Court in its construction of the law, yet, he says to them, it should not be on slight or trivial grounds; but that they should be clearly satisfied that the Court was wrong, before they did differ.

Why, we respectfully submit, make an issue of this sort, between the Court and the jury? Why compel them to find that his Honor, for whom, as a man and a magistrate, the jury feel, in common with the whole country, the greatest respect, was clearly wrong about the law. The verdict of the jury should embody their opinion of the law, as well as of the facts. And they are not required to be "clearly satisfied" that the Judge is wrong. But if they entertain doubts as to the law, the prisoner is just as much entitled to the benefits of those doubts, as if they applied to the facts. It is impossible for this Court to be more explicit than it has been upon this point. In the case of *Keener vs. The State*, (18 Ga. Rep. 194,) the rule upon this subject is elaborated with

great care. The Court, after submitting to the jury, its view of the law—a delicate duty, by the way, under the penal code—should simply say to them: “But, gentlemen, it is made your duty, under the law, to pronounce upon the law, as well as the facts of the case;” and there leave the matter.

[4.] We are not clear that the Court intended to repudiate the proposition, that one may kill another against whom he has malice, and yet not be guilty of murder. The bill of exceptions, however, is scarcely susceptible of any other meaning. If he did, it was error. Whenever the circumstances of the killing would not amount to murder, the proof even of express malice will not make it so. One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart’s blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account. This principle is too plain to need amplification.

[5.] After charging as to the effect of intoxication upon the crime, the Court added, “but drunk or sober, the killing of a human being, in the sudden heat of passion, *without malice express or implied,* will not amount to voluntary manslaughter, unless it appear that the deceased had made some actual assault upon the person of the accused, or that there was an attempt by the deceased to commit a serious personal injury on the accused.”

We cannot concur in this charge for several reasons. It asserts, as it stands, what cannot be legally true; namely, that there may be murder without malice. The learned Judge, we are quite sure, did not intend to assert such a doctrine. Again, it maintains that unless the deceased made some actual assault upon the defendant, or intended to inflict a serious personal injury upon him, the homicide cannot be reduced to manslaughter. In the case of *Stokes vs. The State*, (18 Ga. Rep. 17,) this Court endeavored to establish, and we think successfully, that this proposition is not true. And

it may not be in the present case, even putting the most favorable construction for the State upon the testimony. Suppose no assault was made by Jordan when he seized the tumbler; still, looking at all that transpired that day, if the effect was to excite beyond control the passion of the prisoner, and yielding to the momentary impulse, surrounded as he was by his enemies, who had followed him to his place of retreat, he killed Jordan, the law, in mercy to his weakness, and in view of the provocation given, might well hold that he shot in sudden heat, and not in the spirit of revenge.

[6.] As to the effect of drunkenness upon crime, we are not prepared to say that the view taken of it by the Judge, was not quite as favorable as the defendant had any right to ask. That drunkenness cannot excuse crime, the code, as well as the common law, is quite explicit. The modern decisions would seem to go to the length of holding, that the drunkenness of the prisoner may be considered on the question, whether the prisoner was excited by passion, or acted from malice. (32 *Engl. Com. L. Rep.* 751; 4 *Humph. Rep.* 141.) The Court gave to the prisoner the benefit of this doctrine; and we are not inclined to interfere with the qualification annexed to it, to-wit: that to entitle the accused to the benefit of this rule, he should strike with a weapon which he casually held or obtained, and not use a pistol or bowie knife, deliberately procured with a view to a rencontre.

[7.] As to all those requests which were based upon the idea, that the circumstances which attended the killing, were sufficient to excite the fears of a drunkard, or a coward, or even of Mr. Golden, the law makes no such discrimination. They must be such as to excite the fears of a *reasonable man*.

As to the competency of the juror, Slaughter, he will not be sworn again to try this cause; and having made so many rulings upon this subject, each depending like this, upon the special facts of the case, we deem it unnecessary to reiterate our opinion upon this vexatious and oft-recurring topic. The conduct of this juror in lying, as he confesses he did, to

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avoid the performance of a public duty, is reprehensible in the highest degree; and all similar behavior in future, might well provoke the punitory power of the Court.

Upon the whole, the general impression left upon the mind of the Court, by the proof in this record, is this: Mr. Golden was not without fault upon this tragic occasion. He was willing to engage in combat with any of the party except Jordan. But Jordan was thrust forward, and pressed into the service by his associates, to whip Golden. Jordan acted upon the conviction that Golden was a coward, and that he could be bullied as such. To this impression his death is to be attributed. Thousands have fallen in the same way. Bonaparte lost the empire of the world by underrating his enemy. That Golden might have avoided the catastrophe is probable. That he was crowded by his foes is too obvious, from the proof. How far he is excusable for the death of Jordan, if at all, we refer back, to the decision of another *impartial* jury.

Judgment reversed.

THE SOUTHERN BANK OF GEORGIA, plaintiff in error, vs. WILLIAM WILLIAMS, defendant in error.

The fraudulent organization of a Bank cannot be set up as a defence against the payment of an acceptance.

Complaint, from Decatur. Tried before Judge ALLEN, April Term, 1858.

The plaintiff sued defendant as acceptor on three bills of exchange, payable at the Southern Bank of Georgia.

Defendant pleaded, 1st, that the plaintiff had no legal organization, because the commissioners did not do their duty, as prescribed by the Act of incorporation; in opening books of subscription—not opening any books at all.

2d. That they did not give notice and convene the stockholders, as required by the Act of incorporation, for the purpose of electing directors.

3d. That prior to the pretended organization, there was not five subscribers of shares in said banking company.

4th. That fifty thousand dollars in specie was never paid in or to said banking company, or to commissioners, or to any person, as is required in the 3d section of the charter of said bank; and if the Ordinary so certified, as is required by said 3d section, the certificate is false, and was fraudulently obtained from said Ordinary.

5th. That the consideration of the bills of exchange sued has partially failed, because the bills of said bank received for them were not good, solvent or current, at the time of their purchase, and therefore, that plaintiff ought not to recover.

Plaintiff demurred to each and every one of said pleas of said defendant; which demurrer the Court overruled, as to each and every plea. Whereupon, plaintiff excepts.

LAW & SIMS; and LYON; and IRWIN & BUTLER, for plaintiff in error.

JNO. W. EVANS; NESBITS; and CAMPBELL & EASTERLENG, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

The defence set up in this case cannot be allowed. As strong as the language is, which is used in some of the cases decided by this Court, they do not apply to the case of a bank whose charter is like that of the plaintiff. There is no condition precedent in this charter; nothing to be performed as a condition on which the bank was to commence business.

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It *may* commence business as soon as fifty thousand dollars in specie shall have been paid, but there is nothing prohibitory in the clause. This Court, in cases which it has decided, has used very strong language, and language which, taken disconnected from other parts of the opinions delivered, might seem to warrant the defence set up in these pleas, if there had been a condition precedent in the charter; but upon a careful examination, it will be found that the Court referred to proceedings on the part of the State, for the forfeiture of the charter. Some of the matters set forth in the pleas under consideration, are sufficient, if true, to authorize the State, if it be its will, to proceed against the bank for the forfeiture of its charter, and also to give creditors a remedy against all parties aiding and participating in the wrongful organization.

But if there were conditions precedent of the most imperative character in the charter, and a grossly fraudulent organization had been gotten up by collusion between the commissioners and the subscribers for stock, and the bank had been put into operation apparently fairly, and held out to the community as a regularly and honestly organized bank, discounting notes and paying out bills, it would be a strong act of injustice to hold, that the fraud in the organization could be pleaded collaterally, as a defence by the bank, against the payment of its notes, or by a debtor to the bank, to defeat the collection of the debt due by him.

The bank should not be allowed to take advantage of its own wrong, and the debtor of the bank, who has received an equivalent for his note, ought not to be allowed to avail himself of a defence of the sort, to diminish the means of paying the debts of the bank. Such a defence is an attack on the existence of the bank, which cannot be allowed in such a mode.

I am of opinion that the pleas of the defendant, which were demurred to, show no sufficient matter of defence against the

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recovery of the acceptances, however efficient the facts pleaded might be in a proceeding against the bank to forfeit its charter.

Judgment reversed.

JAMES DORSETT, administrator, &c., plaintiff in error, vs.
THOMAS D. FRITH, defendant in error.

In an action of trover, to recover for the conversion of slaves, which have been sold by defendant and cannot be delivered, the purchase money with interest thereon, is a proper criterion of damages, provided the sale has been fair.

F. intermarried with S., a widow, with several minor children. By the consent and counsel of the brothers of his wife, F. received at the same time a negro girl, which he sold, together with her infant child; with the understanding that the debts of the former husband were to be paid out of the proceeds and the children raised and supported. D. one of the brothers-in-law administered many years afterwards, on the estate of the former husband, and brought trover against F. for the negroes.

Held, That upon a bill filed, the administrator was bound to account for the debts and expenses of the estate and family; allow F. to retain his distributive share, and also to deduct the amount of certain demands paid out for one of the children, deceased.

[1.] The acts of an executor, *de son tort*, will be upheld, if they are such as the regular executor would be bound to do.—BENNING, J.

[2.] When the conversion is not a continuing one, but begins and ends in a single act, as a sale, the value to be taken as the measure of the damages is the value at the time of this act.—BENNING, J.

Equity, from Randolph. Tried before Judge KIDDOO, May Term, 1858.

William D. Siller, died leaving his wife Maria and three children, Lorenzo, Eldridge and William. He was possessed at the time of his death of one negro slave by the name of Feraby, about twelve years old. Thomas D. Frith intermar-

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ried with the widow of the deceased, and took possession of said negro, and raised the said children of deceased; the marriage was in ———. James Dorsett, the brother of the widow of deceased, administered on the estate of said William D. Siller long after the marriage, and brought an action of trover against Frith for the negro girl.

Frith filed a bill, praying for an injunction to restrain the suit, &c., alleging that Siller died, leaving the widow and three children, that he intermarried with the widow and supported and educated the children of deceased, and paid the debts of the said widow, amounting to about seventy dollars, that he took possession of the negro girl at his marriage, and believed her to be, and claimed her as his own, but found and took possession of no other property at the time or since, of the deceased; that James and John Dorsett are brothers of his wife Maria, and that after the death of Siller, they advised her, that they had in their hands assets enough to pay the debts of the estate of her husband, belonging to said estate, and would pay them, and advised her to take the negro girl Feraby and try and raise the children, that the estate was not worth the expense of administration, and that after his marriage, the said negro girl remained in his possession about five years, and was sold by the consent of his said wife; and with the knowledge of the said Dorsett; that he treated the children of said deceased as he did his own; that William Siller was sick and a constant trouble and expense, and that in 1853, he boarded him and paid tuition for him at an expense of \$48 40; that for the ten years he took care of William, \$660 would have been a poor compensation for the food, nursing, clothing and doctor's bill, he furnished for him, that William's services were worth nothing to him, that he paid out a good deal of money for Lorenzo's debts, after he died; that his services were worth his boarding and schooling to him; that there are no debts due and owing to and from the estate of W. D. Siller deceased, requiring administration, &c.

The material facts in the bill, were put in issue by the

answer, and on the trial, both cases trover and equity, were tried together for the purpose of having an account between the parties.

With other evidence counsel for complainant introduced various notes and accounts against Lorenzo D. Siller, and proved that they had been paid off by complainant after the death of said Lorenzo. Defendant objected to the introduction of the same. The Court overruled the objection, and defendant's counsel excepted.

Counsel for defendant proposed to prove the value of the negro woman Feraby, and the value of her hire, from the sale by Frith up to the time of the trial, annually, and the number and ages of her children, and their value, and the value of their hire annually. To which complainant's counsel objected.

The Court sustained the objection, and defendant's counsel excepted.

The Court charged the jury, that if complainant upon his marriage with Mrs. Siller, took possession of the negro girl belonging to the estate of her deceased husband, and took charge of her children and has treated them as a father ought to treat his own children, he ought now only to be held to account fairly with them.

In the opinion of the Court, it would be equitable and right to charge Frith with the annual hire of the negro up to the time of her sale, and interest thereon to date, deducting the expense of raising her, if any; add what she and her child sold for if the sale was a fair one, otherwise what she was worth at the time of the sale, with interest, until date; set off three-fourths for the Siller boys, and add the annual value of them with interest. Place to the credit of Frith the expense of maintaining and educating the boys, and the sums he paid for William, after his death, with interest. If a balance be found against Frith, find that amount for the administrator. If no balance, then decree that the action of trover be perpetually enjoined.

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To which, and to the decision of the Court, in permitting the account of A. O'Brien against Lorenzo to go to the jury, on the proof of O'Brien's handwriting, defendant's counsel excepted. And on these several exceptions, error is assigned.

TUCKER; and E. DOUGLAS, for plaintiff in error.

GEO. S. ROBINSON, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

This is the second time this case has been before this Court; and to be justified in sending it back again, we should be clearly satisfied, not merely that injustice *may* have been done, but that the plaintiff in error has *actually* been wronged. How frequently are these little properties consumed by protracted litigation—the greatest curse that can be inflicted on parties.

And so far from right's not having been done, we have every reason to conclude, under the charge of the Court, that the contrary is true.

What are the facts? Mr. Siller dies, leaving a widow and three small children, and a negro girl of twelve years of age. No administration is taken out upon his estate, by his brothers-in-law, or by any body else. Frith intermarries with the widow. He raises the children as his own. The girl has one child and upon consultation with his wife, Frith concludes to sell the negroes. The fact, that in right of his wife, he was entitled to one-fourth of the price, is the surest guarantee that she and the child brought their value. Frith settles the outstanding debts against the estate and rears the children. One of them dies before there is any accounting with him by Frith; and Frith discharges this son's debts, the proof showing that he had agreed to do so, in Lorenzo's life time, and at the time they were contracted.

At a distant day, when the children are raised, the Dorsetts are induced to come forward and administer on the estate of their deceased brother-in-law. Knowing of the sale made by Frith years and years before, they bring an action of trover against him to recover the negroes. They knew of the sale at the time it was made, and did not object.

What was the measure of damages to which they were entitled? I answer confidently, that in a case like this, where it is impossible to deliver the property, that the value at the time of sale, with the interest thereon, is the rule sustained by the current of cases, English and American. I am aware, that numerous dicta may be found which seem to indicate a different doctrine. I will not say, that there are not adjudicated cases to the contrary. But upon examination, I apprehend it will be found, that whenever the books speak of the highest value from the date of the conversion to the time of trial, as the measure of damages, they refer to cases in which it is possible to deliver the property in discharge of the verdict. And so the Judge instructed the jury that if they should find the sale was not fair, they might award the present value of the negroes. No doubt it was fair, it being the interest of the vendor to get the highest price. We assume then, that the criterion of damages was properly submitted. Hire to the time of sale, the purchase money with interest since; more I doubt not, than the annual hire would have amounted to.

Shall it be asked, shall a *tortfeasor* be dealt with as though he was clothed with authority to make the sale? We reply, no more than this could be recovered against an *executor de son tort*; and this is the most that can be made of Frith, and that too, only as to three-fourths of the property. He owned the other fourth. He was a joint tenant of the whole. So much for the trover action.

As to the instructions of the Court respecting the equitable set-off to which Frith was entitled, all that was argued and decided when the case was up before. Either we were

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wrong then, or the Circuit Court is right now. All that matter has been properly submitted to a special jury, and we doubt not, that their verdict is nearer right than this Court can make it.

Suppose Frith did pay some of Lorenzo's debts after his death, he had promised to see them paid at the time they were contracted. But if he had not, should the portion of his stepson be wrenched from his hands, until he was re-imbursed the amount that he had justly expended for this purpose? To quote the principle, that one cannot make another a debtor against his will, is a misapplication of it to such a case. What are the heirs at law of Lorenzo Siller entitled to? The residue or net surplus of his estate, after his debts are paid. And does it matter to them, whether they were paid by Frith, without an administration and without expense to his next of kin, or through an administration?

We are happy at not finding ourselves constrained to send this case back. For we may talk as much as we see fit, about breach of trust, usurpation of power, &c., in this case, the key to it is just this: up to the sale of the girl and her child by Frith, all who were concerned in the estate, thought he was managing for the best interest of all concerned. But the woman it seems, instead of dying or proving barren, or valueless, for any other reason, has turned out to be a most prolific breeder; and as poor Frith for his own sake, as well as the good of his step-children, had not the prescience to foresee this, the result must be visited upon his head. We are all willing to take wives and contracts and everything else, for *better*, how few for *worse*! The recollection of the ruin of one honest trustee in this State, has made me slow to repeat the infliction. He sold ten negroes in January 1837, big and little, young and old, for \$10,000. Those were the flush times in Georgia. He re-invested the proceeds in Railroad Stock at par. A new guardian was substituted. The new investment was repudiated, and in the face of an offer to restore the identical negroes with hire—

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which was refused—the \$10,000 with interest was recovered thereby bankrupting the old trustee, for a miscalculation, and seriously injuring his security. The wards rejoiced at the sale, but would not abide the re-investment.

Judgment affirmed.

Brewing, J. concurring.

All the questions in this case, except two, were waived. Of those two, the first was, as to whether Frith was entitled to an allowance for the debts of Lorenzo Siller, which he had paid after the death of Lorenzo; and the second was, as to what was the measure of the damages, in respect to the negroes.

Lorenzo's share in the property sued for, exceeded in value the amount of his debts paid by Frith. Frith, therefore, in paying those debts, did not incroach on the shares of the other distributees.

[1.] And the act of payment, was, at most, but the act of an executor *de son tort*, and the acts of an *executor de son tort*, will be upheld, if they are such as the regular administrator would be bound to do.

I think, then, the Court was right in holding, that Frith was entitled to an allowance for the payment of these debts.

Frith, soon after his marriage with Mrs. Siller, sold the negro woman and child belonging to the estate of the late husband of Mrs. Siller. After the sale, the woman had other children, and the child which was a female, also had children.

The Court held, what amounted to this; that the value of the woman and her child, at the time of the sale, was, (plus hire,) the value to be taken, as the measure of the damages. Dorsett's counsel objected to this, insisting: First, that the value of the issue born after the sale, should also be taken into the account: Secondly, that, if wrong there, yet, that

the value of the woman and child at the time of the sale, or the value at any time afterwards, up to the trial, might, at the option of the jury, be taken as the measure of the damages.

The time of the sale, for ought that appears to the contrary, was the time of the conversion. The conversion consisted it seems, in the act of sale.

There is a conflict among the authorities, as to whether the jury are confined to the value at the time of the conversion, or are to have the option of taking that, or, some subsequent value. Mr. Sedgewick seems to think, that they are confined to the value at the time of the conversion. *Sedgewick, Meas. Dam.* 481. See *Id.* 475, *et seq.* See too, *Suydam vs. Jenkins*, 3 *Sand.* 61-1.

This Court has held, that the jury were at liberty to take the value even up to the trial.

The injury consists in the *conversion*, and as long as the conversion endures, the injury endures. Every instant of the conversion may be considered a repetition of the injury. The thing remains the true owner's at the last instant of the conversion, as much as it was his, at the first. But after the wrong doer has parted with the thing to another person, the conversion ceases as to him, and passes over to that person, and abides with him as long as he keeps the thing.

I think, therefore, that the only cases in which, the option exists to the jury, of taking a value subsequent to the first conversion, are the cases in which, the property remains in the possession of the defendant subsequent to that conversion; that is, are cases in which, there is a continuing conversion; and, that in these cases, the option does not extend beyond the time when he parts with the possession; that, if the owner wants to recover by a value taken subsequent to that time, he must elect to sue the person to whom the possession has passed.

In the use of the word, "elect," I do not mean to say, that suing one who converts a female slave, and recovering from

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him, is a bar to a suit against a person to whom he may have sold her, for the *issue* of the slave, if she have had issue after she came into the possession of this person. I express no opinion on this point.

It must be apparent from what I have said, that I agree with the Court below, on the question under consideration. The conversion was not a continuing one.

McDONALD, J. dissenting.

I dissent on the ground alone, that I think evidence of the value of the woman Feraby and her child, and of her hire from the time of the sale to the time of the trial, ought to have been admitted to go to the jury. The action enjoined was an action of trover. The plaintiff might have waived the *tort*, and sued in assumpsit for the price for which the woman and child were sold. In that event he could have recovered the sum for which they were sold with the interest. But he chose to proceed *in tort*. The defendant in trover was a wrong-doer and the plaintiff ought not to have been damnified by his *tort*, even if the defendant derived no advantage from it, further than the then value of the negro. The English rule of damages affords no just criterion here, in suits for the recovery of slaves, because they have no slaves there. A case like the one before us, of the conversion of a female slave and her child, constant increasing in value, is unknown in the English law. But apply a *principle* of the English law to this case, and there is no difficulty: If a case be such that either the person who *commits*, or the person who *suffers* the wrong must lose, the loss must fall on the wrong-doer. The defendant should make complete reparation for the wrong which he had committed. If he had not sold the negro, the administrator would have been entitled to receive from him the negroes as they were at the time of the trial. Should the *tort* of defendant put him in a worse condition? I think Judge WARNER, in delivering the

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opinion of the Court in the case of *Schley vs. Lyon & Ruth-
erford*, 6 Ga. 535, stated the principle of the Court in award-
ing damages in actions of trover to be, "that the plaintiff is
entitled to a *full indemnity* for the injury sustained, by rea-
son of the *wrongful conversion* of his property by the de-
fendant; that the defendant shall derive no benefit from his
own wrongful act"

**MARTIN W. STAMPER et al., plaintiffs in error, vs. JAMES
HAYES, for use, &c., defendant in error.**

- [1.] In a suit on a promissory note, slight evidence that title to the note is in the plaintiff, will be sufficient to prevent a nonsuit.
- [2.] A receipt of payment, though not obtained fraudulently, yet, if obtained by mistake, or, without consideration, does not bind.
- [3.] A purchaser, even with notice, from a purchaser without notice, is equally protected with the latter.

Complaint, from Early county. Tried before Judge KID-
DOO, ——— Term, 1858.

The facts of this cause are stated in the opinion of the
Court.

HOOD & ROBINSON, for plaintiffs in error.

COOK & LYON, *contra*.

By the Court.—BENNING J. delivering the opinion.

The suit was on an endorsed note, of which the following
is a copy :

Stamper et al. vs. Hayes.

"By the first day of January, 1855, we promise to pay James Hayes one thousand dollars, for value received.

This 20th July, 1854."

(Signed)

"M. W. STAMPER,
E. C. CORBETT."

"I endorse the within note, and transfer it to C. Hart, for value received. August 24th, 1854."

(Signed)

"JAMES HAYES,
C. C. BARNARD."

There was no endorsement from Hart to Pollok, for whose use the suit was brought by Hayes.

The defendants "moved for a non-suit, upon the ground, that the equitable title in the note, having been transferred to C. Hart, by written endorsement, and never having passed from him, it was improperly brought; no equitable title or interest having been shown in Morris Pollok; which motion, the Court overruled, and the defendants excepted."

This is the first exception.

A part of Barnard's testimony was as follows: "He does not know whether or not, Morris Pollok traded for the note with the notice that the negotiability of the same was restrained. He gave for the note, the effects of a grocery, he considered, worth three hundred dollars."

Here, is some evidence, that the title *had* "passed" out of Hayes and into Pollok. True, this witness, Barnard, had, in a previous part of his answers, said, that "Hayes," (not Pollok) "bought out the effects of a grocery from Hart and McCabe." "The thousand dollar note was to pay for the same."

But both statements being before the jury, it might be, that they saw reason to prefer the one first quoted to the one last quoted; or saw some way of reconciling this to that.

Then, the possession of the note was in Pollok.

[1.] We think then that there was evidence enough of Pollok's title to the note, to prevent a non-suit, especially, as

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he had not been particularly warned to bring evidence to that point, there being no plea, that he had no title to the note.

The defence was payment; and, to support it the defendants introduced a receipt in the following words:

"Received of E. C. Corbett, one thousand dollars, in full payment for a note, I hold on Stamper & Corbett, due January, eighteen hundred and fifty-five. Oct. 10th, 1854."

(Signed,)

"JAMES HAYES."

And witnessed,

JNO. M. SMITH."

One of the defendant's requests to charge, was; "That Hayes, in order to evade the effect of his receipt, must show, that it was obtained fraudulently, and if not so shown, it is good against him, and is a good defence to this note, unless Morris Pollok had previously obtained an equitable interest in said note." This request was refused, and the refusal was excepted to.

[2.] It may be, that a receipt will not bind, even though not obtained fraudulently. A receipt obtained by mistake, or without consideration, does not bind; and it was quite a question on the evidence in this case, whether this receipt was not obtained without consideration.

The first part of this request, then, was not proper.

[3.] The same may be said of the remaining part relating to Pollok, and, for the reason, that that part leaves out of view, the relation which *Hart*, the first transferee, bore to the case. If *Hart's* title was good, if he got the note at a time previous to the receipt, and Corbett knew that, when he took the receipt, then the title of Pollok, *Hart's* transferee, was equally good, even though Pollok, when the transfer to him took place, had notice of the receipt. A purchaser, though with notice, if, from a purchaser without notice, is protected to the same extent to which, the latter is.

We think, that the Court was right in refusing this request in both its parts.

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There were some other exceptions, but they were abandoned.

Judgment affirmed.

**FREEMAN WALKER, et al., ex'ors, &c., plaintiffs in error, vs.
PERSONS WILLIAMSON, et al., defendants in error.**

- [1.] Grand-children cannot take in a will, under a bequest to children, unless there be something in the will to indicate and effectuate such intention by the testator.
- [2.] Nothing would pass to a son of a testator, under a bequest to his children, who died in the lifetime of the testator.
- [3.] Where there is a power of appointment, the execution of the power must fail, before the property, the subject of the appointment, can be distributed.
- [4.] Children of a testator's children who died before the making of the will, take under a bequest to his children, living at the time the estate is to be divided, and their representatives, if they should be dead.
- [5.] If there be an intestacy in regard to any part of a testator's estate, the executors shall hold it in trust for the benefit of the next of kin of testator.
- [6.] A son, in life at the time of the making of the will, but who dies in the lifetime of the testator, does not answer the description of children, to whom the property is given.
- [7.] Legatees are not to account for property as advancements given to them in a will, in the distribution of a part of the testator's estate not disposed of by the will.

Equity, from Taylor. Tried before Judge LAMAR, April Term, 1858.

Persons Walker died, leaving a will, directing in 2d item, that all of his property should be kept together by his wife, until his son George Washington was twenty-one years of age, or married, having power, in her discretion, to lend to such children as should marry before George was of age or married, such negro or negroes as she might see proper; and when the event of George's attaining to majority or marry-

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ing took place, all his negroes, including such as may have been lent to his children, were to be brought together, and a division made among his children, share and share alike; the negroes being divided into lots, and each child drawing a lot.

Item 3d. Before this was done his wife was to select seven negroes for her use and benefit, and subject to her control alone, during life or widowhood, and to have 500 acres of land including the homestead, wherever she shall select, all the household and kitchen furniture, and as much of the stock as she thought she should need; and at her death, said property to be equally divided between his children.

Item 4th. And he wills the property falling to his daughters, free from their husbands' control, &c., and if either of them dies without issue, then the property given to such daughter, is to revert back to his other children in life, or their children, if they be dead leaving children, to be equally divided between them. The income only of the property given to his daughters, is to be at the disposition of their husbands, for the benefit of their families.

Item 5th. All money arising from his property, over and above a sufficiency to support his family, and educate his children in a proper manner, was to be loaned at lawful interest, into good hands, with security, until the division took place.

Item 6th. He desires his wife to manage as she pleases, the money arising from her part after the division, so that if misfortune should be the lot of any of their children, she should be the better able to aid and protect such child. If his wife married, she was not to take the property above appointed to her, but an equal division was to take place, and she take a child's part.

Item 8th. Directs his lands wherever found, to be sold in the counties respectively where they are, to the highest bidder—terms, three payments, annually, in small notes and approved security.

Item 9th. The stock left after his wife's choice, to be sold, and proceeds divided equally between his children, or their representatives, if dead.

Item 10th. To his three grand-children, Persons Williamson, William A. Williamson, and Carey Walker, son of Allen Walker, deceased, each the sum of \$500 at the time of the division, to be lent out at lawful interest by Lawrence and Freeman Walker, until said grand-children arrive at majority, and then principal and interest paid to them; and said Freeman and Lawrence were to give security for the payment of the same at that time; his said sons, Freeman and Lawrence, and Allen F. Owen appointed executors, and Owen to be employed whenever an attorney was required in the affairs of the estate, at a fair compensation for his services.

Persons Williamson, William A. Williamson, by their guardian *ad litem*, James Williamson, and Carey Walker, by his guardian, Carey T. Cox, filed their bill, alleging that Persons Walker died 18th March, 1854, possessed of a large estate, leaving his will dated 16th March, 1850, which was admitted to probate 5th day of June, 1854, and letters testamentary issued to Freeman and Lawrence Walker, who immediately took charge of the estate, and sold the perishable property for a large sum, and that George Washington having arrived at the age of twenty-one years, the negroes were brought together, and the widow selected her seven, and the remainder were left for distribution.

And complainants allege, that they did not at that time, and have not since, received any portion of said negroes. The bill goes on to set forth particularly, the assets in the hands of the executors.

Persons and William A. Williamson allege that they are the only children of James Williamson and Euphrasia Williamson, his wife, and that said Euphrasia was the daughter of said testator; that their parents married the 18th November,

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1841, and that they were the issue of such marriage; and that the said Euphrasia died 19th November, 1844; that said testator did not, in his life time, give to said James and Euphrasia, his wife, or to said Persons or William A., any property whatever, nor have said executors allowed them any except the \$500 each, which is held by said executors in trust, until each shall arrive at majority respectively.

The bill alleges that Carey Walker is the son of Allen Walker, who was the son of testator, and said Allen died previous to testator, leaving said Carey his sole heir, and that said Allen did not, in his lifetime, receive from testator anything, nor have the executors ever allowed the said Carey anything except the \$500, which is held by them in trust, until the said Carey attains majority. That Carey T. Cox has been appointed guardian of said Carey Walker. At the death of testator he had nine children living, who, with complainants, are the heirs at law of said testator; that if Philip Walker, one of the children living at the time of the making the will, had been living at testator's death, he would have been entitled to his distributive share of the estate, and that inasmuch as said testator died without altering the bequest to Philip, that said Philip's interest in said estate lapsed, and that testator died intestate as to said interest; and that they, (complainants,) ought to receive two-elevenths of said Philip's share; and that the executors are trustees holding said share for the heirs at law of Philip; and that they have not allowed complainants interest, or otherwise any part of Philip's share of the estate.

Complainants aver that the testator did not dispose, in his will, of the money arising from the sale of land, from the sale of cotton, from solvent debts; and as he did not, they are entitled to, and should receive thereof, two-elevenths; and that the executors have not allowed them in trust, any portion of said fund. That the testator advanced to his nine children named in the will, a large amount, to the exclusion of your orators, except as to the \$500 before mention-

ed, to each; and that before the said nine children should receive any of the fund mentioned undisposed of by will, complainants should receive an amount out of said fund, sufficient to make them equal with those nine children, who have been thus advanced; that they are heirs at law of testator, and should receive an equal part of his estate; and pray the judgment of the Court, if they are not entitled to an equal share of property to be returned to the estate from the widow, and divided. That the executors refuse, complainants any interest in said estate, except the \$500 each.

The defendants demurred to the bill on the grounds,

1st. That there was no equity in it.

2d. That there are not proper parties to it.

3d. That complainants have no right to call on defendants for any answer, or for any relief, touching the subject matter of the bill.

4th. That it appears from the bill, that they are not entitled to the relief prayed for, or any at all; that if they are, they are not entitled to call on these defendants for it, but on the administrator.

The Court overruled the demurrer and held, that complainants took no portion of the negroes bequeathed under the third item of the will, as representatives of their deceased parents, or because Philip Walker, living at the time of the making of the will, died before the testator, childless.

That the money arising from various sources named, and in the hands of the executors, undisposed of by the will, is the residuum of testator's estate, to shares of which complainants are entitled, *per stirpes*, among the next of kin of testator; that the complainants were entitled to the proceeds of the sale of stock, &c., under the tenth item of the will.

That the said executors are, as to the undisposed of residuum under said will, trustees for the next of kin of testator, and should account to the complainants for their respective shares.

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To all of which rulings and decisions of the Court, the defendants, by their solicitors, excepted and assign error.

REESE & CORBETT, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The period having arrived at which the testator's estate was to be distributed, the complainants file their bill claiming to be entitled, as heirs at law of the testator, to distributive shares of parts of his estate, which they insist do not pass by the will. One of the testator's children, Philip Walker, named as a legatee in one clause of the will, died in the lifetime of the testator, leaving no issue; his legacy lapsed, they allege, and that they are entitled to a part of that lapsed legacy.

The bill was demurred to on the grounds set forth in the statement of the case. The presiding Judge in the Court below overruled the demurrer, and error is assigned on his judgment.

[1.] The complainants, as heirs at law of the testator, are entitled to a ratable proportion of that part of his estate, and that only, which did not pass to legatees under the will. The negroes all passed by the second item in the will, absolutely, except seven, which the wife, by the third item in the will, was authorized to select for her own use, during her life or widowhood. They passed to the children of the testator. Grand-children cannot take by the description of children, unless there be something in the will to manifest that intention. There is nothing of that sort in this will.

[2.] Nothing could pass to Philip Walker, for he is not named; and at the death of the testator, he was dead. He was not a child. Under that item of the will, then, there was no lapse into the estate of the testator, of any interest in the negroes, by reason of the death of Philip Walker in the life

time of testator. It is unnecessary to consider the question of lapse under the third item of the will, as the tenant for life or during widowhood, is still in life. The complainants, therefore, could take no part of the negroes under the second item of the will, and could take none as an interest lapsed by the death of Philip Walker.

[3.] The fourth item in the will settles the portion of his estate to which his daughters shall be entitled, to their separate use for life, with remainder to their children, &c., &c.

The fifth item gives directions as to the surplus of his crops, after supporting his family. It is to be loaned at interest until the division of his estate. By the sixth item the wife is directed to dispose of the proceeds of the sale of the crops as she may think best, so that she might be able to assist any child who may have been unfortunate. The object of the testator in giving this power to the wife, is expressed by him. If the wife should not execute the power during her life, this fund will fall into the estate at her death, and be then distributable among the children, and representatives of children, as property undisposed of by the will.

[4.] The seventh item directs that if the wife should marry, she shall not take the seven negroes, land, &c., but that an equal division should be made at the time mentioned, and she should take a child's part. To have set apart to her a child's part, the portion must have been ascertained according to the statute of distributions, and each living child, and the representatives of deceased children, must have been counted, to arrive at the number of shares. This shows that the equal division of estates, provided for by the statute, was in the testator's mind, and this conclusion is supported by the more distinct expression of his purpose, in the ninth item of the will, where he disposes of the proceeds of the sale of the stock, which might be left, after his wife had taken out what she needed, equally among his children living at the time, or their representatives, if they should be dead. Here is a disposition of the proceeds of the sale of his stock,

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precisely such as the law makes, except that the wife is excluded. The children and representatives of children take together. *Burch vs. Burch*, 20 *Ga. Rep.* 834, 839; *Jarvis vs. Pond*, 9th *Simon's Equ. Rep.* 549. There is a good reason for the exclusion of the wife, for she was to take all the stock she needed, and it would not have been equal to have permitted her to take a part of the proceeds of the sale of the balance.

The lands and notes are not disposed of by the will, except the notes given for the crops, and notes, if notes were taken, for the stock when sold.

[5.] There being an intestacy in regard to the lands and notes not disposed of, they must be distributed as intestates' estates, and the complainants are entitled to their share. There is no necessity for an administration on the part of the estate not disposed of by the will.

The Act of 1828 declares, that the executors shall hold it as trustees for the next of kin of the deceased. *Cobb Dig.* 327.

[6.] According to the interpretation we put on the will, the entire interest intended for Philip Walker in the estate, lapsed by his death without issue in the life time of the testator. He could take no interest under the second item of the will. The children who are beneficiaries under that item are not named. The negroes are given to the children as a class, and he was not of that class at the death of the testator.

[7.] It is insisted that the negroes given by the will, should be considered as advancements to the children to whom they were given, and that they should be accounted for in the distribution. The testator directed, that all negroes lent to his children either by himself in his lifetime, or that might be lent by his wife after his death, should be brought together, at the time appointed for the division, and divided among his children. It is clear, that from some unexplained motive, he did not intend his grand-children to receive any part of his negroes. He gave them pecuniary legacies, which he may have intended as a substitute for negroes. He gave

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no such legacies to his children. He seems to have intended to make a distinction, and we are not authorized to overrule his purpose. Our statute applies to intestates' estates, and, therefore, can have no reference to advancements by way of legacy.

If a testator dies intestate purposely, as to part of his estate, and he gives parts of his estate to children who would be distributees of his estate if he had died intestate as to his whole property, and who would share with other children to whom nothing is given by the will, it must be presumed that he intended to give some of his children an advantage over the rest. We should disappoint his purpose, and indeed, make a will for him, if we were to hold that the legatees should account for what they received under the will, before they could share in the undisposed part of the estate. It is seen that we do not affirm all the rulings of the presiding Judge in the Court below, but we affirm his judgment in overruling the demurrer to the complainants' bill.

Judgment affirmed.

WM. D. ELAM, et ux., plaintiffs in error, vs. MARTHA N. GARRARD, defendant in error.

Persons interested in the subject matter of a suit in Chancery, ought to be made parties. Our statute makes an exception in suits for the distribution of estates, but it makes no other innovation on the rule.

In Equity, from Chattahoochee. Decision by Judge KIDDOO, February Term, 1858.

This was a bill filed by William D. Elam and his wife, by her next friend, against Martha Garrard alleging that on the

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3d of March, 1831, Jacob Garrard, then in life but now deceased, of the county of Troup, in Georgia, conveyed by deed of trust to W. S. Hardin for the sole benefit of his children, Francis Elizabeth, William Allen, Albert Lewis, James Jackson, Mark Anthony, Nancy Stokes, and Martha Newsom Garrard, certain negro slaves therein named, to have and to hold the same in trust as aforesaid, during the lifetime of the said Jacob; the said trust estate to cease and determine and the said negro slaves to become the property of, and be vested absolutely, unconditionally and equally in the children of the said Jacob, by his then wife, Martha Garrard, which he might have, at the time of his death.

Said Jacob died in 1843, and left several children before named, of whom the complainant Martha N. the wife of the complainant William D. Elam is one. At the death of said Jacob, all of the said property, the negro slaves, went into the possession of the defendant, the wife of said Jacob, who took possession of it as the trustee and natural guardian for her said children, and has had the full benefit and management of it, and still continues in possession of the same as such. That said negroes have been worth annually, and in all, the sum of ten thousand dollars, and the complainant has applied for a full account and settlement of complainants' part of the hire of said negroes and proportionate part of the same, which defendant has refused to give, or in any manner allow, and complainant shows she has no separate estate, and her husband has very little property.

The bill, prays that defendant may be compelled to account, and thereupon directed to pay over the same to complainants, or to a trustee &c., or that a sufficient number of said negroes be sold only, as will pay complainants' part, and the same be settled upon a trustee, for the joint use of complainants during their lives. And if he William D. Elam survives his wife Martha N. she leaving issue, then to him for life and after his death to such issue, and if she survives him, then to her for life and at her death to her children.

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Defendant demurred to said bill, for the want of proper and necessary parties, and moved to dismiss the same.

The Court sustained the demurrer and dismissed the bill; whereupon complainants excepted and assign error.

BLANDFORD & CRAWFORD, for plaintiffs in error.

WELLBORN, JOHNSON & SLOAN, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

Every person interested in the trust estate, ought to have been made a party to the suit. It is the object of a Court of Equity to do complete justice, and settle forever controversies before it. It cannot be done in such a case as that under consideration unless all the parties interested in the subject of the suit are before the Court. A person not before the Court as a party, and who does not come in as a party at some stage of the proceeding, cannot be bound by the decree. If, after a decree in this case, one of the other *cestui que trusts*, not a party, brings a suit against these complainants, charging that his portion of the trust estate had been reduced unjustly by the decree, what is to prevent him from having a hearing? He is no party. The rule is a wise and a good one, and prevents multiplicity of suits in regard to the same subject matter. Our statute makes an exception in suits for distribution of estates. *Cobb's Dig.* 468. But it makes no further innovation on the rule. We affirm the judgment of the Court below, but with this instruction to the Court, that the complainants may on the payment of all costs which have accrued, re-instate their case and amend their bill so as to make the necessary parties thereto, serving each with a copy and subpoena to appear and answer.

Judgment affirmed.

Williams & Co. vs. Nicholson.

R. S. WILLIAMS & Co., plaintiffs in error, vs. **A. P. NICHOLSON,** defendant in error.

- [1.] If there are equities against a negotiable note, it is to be presumed that the transferee of it had notice of them, provided he became such transferee, when the note was overdue.
- [2.] It may be to the interest of one of two joint makers of a note, that the note should not be set aside by the other. When it is, he is a proper party *defendant* to a bill by the other, to set aside the note.

In Equity, from Decatur county. Decision by Judge ALLEN, April Term, 1858.

Alexander P. Nicholson filed his bill, alleging that R. S. Williams and Co., merchants of New York, sued him and Jacob Zeigler, merchants, under the name of Nicholson & Zeigler, on a promissory note dated August 22d, 1855, payable on demand to William S. Beall & Co., or bearer, for \$9759 16, and transferred since its maturity in the name of W. S. Beall and Co., to said R. S. Williams & Co.; that said note is of no effect, and not obligatory or binding upon him. In fact, it was never strictly his note, but that the same was signed by said Zeigler, and by him made payable to said W. S. Beall & Co., or bearer, without his, Nicholson's, knowledge, approbation, or consent and without good or valuable consideration being paid to Nicholson individually, or as a partner of the firm of Nicholson and Zeigler, or to said firm by said W. S. Beall and Co., or any one else, either before or since the date of said note. That in the month of August, 1855, William S. Beall, deceased, then in life, sold to Nicholson & Zeigler a stock of goods then in store in the town of Bainbridge, consisting of a variety of old and unsaleable remnants left on hand from a mercantile business of long standing, say ten years; the contract was entirely verbal. No intimation was made that there was such a firm as William S. Beall & Co., and Nicholson alleges he does not believe such was the case, or that any person was part owner with said Beall of the goods.

The contract was that Nicholson & Zeigler should take the old stock of goods, and pay for them such price as would enable them to make a reasonable profit on them. And as inducement to the trade, the said Beall promised and agreed that in the course of twelve or eighteen months he would join them as a partner in said business; that they would not be called on to pay the money before that time, when a portion if not all the amount would remain in the firm as the capital stock of said Beall, which Nicholson confidently believed would be done as it ought to have been, but was not. The original New York cost, with expenses added, of said old goods when new and fresh, amounted to \$9759 16, and the stock book which was left with Nicholson & Zeigler by said Beall, in lieu of an invoice or bill, will show the cost and expenses of said goods to be as charged, but that one John M. Potter has since taken it away without the knowledge or consent of said Nicholson; and it is his belief it is now in the possession or control of said Potter.

That although the original contract was, that Nicholson and Zeigler should not pay the full cost with expenses added on said stock of goods, but such price as would allow them to make a reasonable profit thereon, yet John M. Potter did, on or about the 22d day of October, 1855, come into the storehouse of Nicholson & Zeigler and hurriedly and privately, secretly and in fraud of Nicholson's rights, obtain from Zeigler the signature which appears to said note, without the knowledge and consent of Nicholson, or the slightest suspicion on his part that such a thing was being done, contrary to the wishes of Nicholson, and the terms of the contract, and equity.

That William S. Beall and Co. were not the owners of the stock of goods at the time Nicholson and Zeigler bought them; that said firm of Wm. S. Beall & Co. had long before dissolved, and while in existence was composed of William S. Beall and John M. Potter, and in the year 185— the

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said Potter retired, and Benjamin F. Bruton came in, and the firm was then Beall & Co; and afterwards Bruton sold out his interest to said Beall, and the business was then conducted by Beall; and that the goods belonged to Beall, and Potter was not then a partner of said Beall, nor a part owner of said goods; that the note given for said goods should not have been for more than an amount to allow a reasonable profit thereon; that it ought not to have been made payable to Wm. S. Beall & Co., but to Wm. S. Beall, for good reasons; that Nicholson and Zeigler made sale of said goods to the best advantage, and that the proceeds thereof did not amount to more than \$7000 00.

That Zeigler and Potter not only did secretly and fraudulently fix up said note to Wm. S. Beall & Co. for too large an amount and without any authority in either or both of them to receipt the stock book or invoice of said goods, thereby showing a settlement by note, but did, under a collusive agreement, attempt to effect another fraudulent purpose, to-wit, prevent the individual creditors of Wm. S. Beall from a successful use of the process of garnishment against Nicholson & Zeigler. And it was agreed between Zeigler and Potter, during this transaction, that said note should nor would not be considered a final settlement of the matter, but that it should be subject to correction and a proper deduction at a future time; and that Potter had great control and influence over Zeigler, and used it to accomplish the aforesaid fraudulent transaction, and showed a great desire to correspond with Zeigler individually concerning the business of the firm of Nicholson & Zeigler; and wrote all letters save one (and they were many) to Zeigler instead of to Nicholson & Zeigler; thus showing his desire to correspond, advise, and contract secretly with Zeigler without Nicholson's knowledge; and Zeigler responded in like manner. That after the purchase of said goods, Beall made a large account with them, say \$1772 96, and the account was made with the understanding that it should go to the credit of Nicholson &

Zeigler's account with Beall for said purchase of goods from him.

That some time in the month of May, 1856, Potter came to him, as collecting agent for R. S. Williams & Co., and presented said note for payment, which was positively refused, Nicholson repudiating it entirely, and said, if the note was payable to the proper parties, and the invoice book marked settled by the proper authority, still it was for a large sum too much. Potter insisted, in conjunction with Joseph Law, an attorney who was then the retained counsel of Potter and the said R. S. Williams and Co. for bringing suit on this note, of which your orator was not apprized at the time, that Nicholson should pay it. They succeeded in getting from him a payment of \$5519 50 in notes and accounts, which amount, after deducting any error that might appear on settling said accounts and paying (unless paid by Nicholson & Zeigler themselves) a balance due from them to Williams & Potter and Converse, Todd & Co., of above \$200, was to be applied to their note of August 22d, 1855.

That neither Potter nor Williams has placed any credit upon said note, nor paid the balance due Williams & Potter, and Converse, Todd & Co. That the said note, dated 22d August, 1855, was drawn and signed in the month of October, 1855. Nicholson & Zeigler were diligently and industriously employed two years in selling these goods, and their services were reasonably worth \$2,000. That R. S. Williams & Co. has sued Nicholson & Zeigler for \$478 33, for rent of the storehouse used in selling these old goods. That a reasonable profit on goods in Bainbridge is 25 per cent. per annum, and in accordance with the original contract, Nicholson and Zeigler are entitled to \$1400 as a reasonable profit; and that the same ought to be deducted from the said amount of \$7,000 00, this being the gross amount of sales as aforesaid, and that the amount for the rent and for the services of Nicholson & Zeigler should be deducted from them, leaving a balance against said Nicholson & Zeigler of \$3,191

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67, which is the strict and full value of the whole stock of old goods at the time they went into their hands. That at the time Beall made the account with them, they knew him to be insolvent, and it was made with the understanding, that it was to be a credit on their debt to him, and that it ought to be deducted, leaving a balance against them of \$1,348 00, and that between the payment of notes and accounts by them to R. S. Williams and Co., and Potter as before stated, and the sum of \$1,348 71, a balance ought to be struck, leaving in favor of Nicholson & Zeigler \$3,870 86, which is the sum (or very near) due, and which ought to be paid to Nicholson for Nicholson & Zeigler by said Potter, as agent for R. S. Williams & Co., in such notes and accounts as Potter may select, or in default thereof in money; and that Nicholson has often requested said suit to be withdrawn and the note delivered up to be cancelled; and that an account of all the said matters should be had, which was refused; and that he has requested the stock book to be marked settled by said note, and to place as a credit on the note, the amount of Beall's account and the storehouse rent, and an amount for the time and services of Nicholson & Zeigler, and an amount less the amount to be paid Williams & Potter, and Converse, Todd & Co., of the aforesaid notes and accounts paid to said Potter as agent; then to strike a balance and pay to Nicholson what was due, which was refused.

The prayer of the bill was for discovery and relief, and injunction against the suits for rent, and on the note.

Defendants demurred to the bill for want of equity.

Because Zeigler, a partner of the complainant, was made a party defendant to the bill, and is not interested in resisting complainant's demand.

Because Zeigler should have been made a party complainant; his interest, if any, being connected with complainant.

Because said bill is multifarious.

Because complainant has full and adequate remedy at law.

The Court overruled the demurrer, and defendants excepted.

LAW & SIMS; and McINTYRE & YOUNG, for plaintiffs in error.

ONEAL & CRAWFORD, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

There can be no doubt, that the bill states a good case, as against the original owners of the note, Beall & Co. The question is, whether Williams & Co., the transferees of the note, stand in no better a condition, than the original owners did. And that depends on whether, they obtained the note with notice of the equities as against those owners.

[1.] It is to be presumed that they obtained the note with such notice, if they obtained it when it was overdue.

The note is one payable on demand, and it was insisted, for the defendants in error, that such a note is always overdue. But there is much conflict of authority on that point. See *Brooks vs. Mitchell*, and note, 9 M. and W., 15.

We are glad not to have to decide it, for the present.

For, the bill says, that Williams & Co. obtained the note "after its maturity;" and the bill was demurred to.

This is enough, be the law on the other point as it may.

We think, then, that there was also equity in the bill; as against Williams & Co., the transferees.

[2.] It was right to make Zeigler a *defendant* in the bill. The bill charges him with participating in the fraud by which the note was obtained. It is to his interest, to keep Nicholson bound with himself on the note. Therefore, it is to his interest to resist the bill. Then, his place is on the defence.

Judgment affirmed

Gragg vs. Richardson.

SAMUEL P. GRAGG, plaintiff in error, vs. JONATHAN P. RICHARDSON, defendant in error.

A purchaser with warranty, finding a third person in possession of the land, sued him for the land; of that suit, his warrantor had notice; judgment went against the purchaser. Afterwards, he sued the warrantor on the warranty and relied on this judgment to show a breach of the warranty.

Held, that the judgment was *prima facie* evidence of such breach.

Action of covenant for breach of warranty, from Twiggs. Tried before Judge LAMAR, March Term, 1858.

On the trial of this case, the plaintiff read in evidence an exemplification of the record of a suit between Jonathan P. Richardson vs Joseph Hill, for lot of land No. 146 in the 7th district of Monroe county, Georgia; which showed a judgment of the Court in favor of the defendant against the plaintiff for cost.

The plaintiff also read in evidence a warranty deed from Samuel P. Gragg to Amos Lasseter, consideration \$500 for lot No. 146, 7th district of Monroe county, Georgia, bearing date 22d November, 1849, recorded 26th January, 1850.

Also a deed from Amos Lasseter to Carlton Wellborn for the same premises, same consideration, with warranty, dated 8th January, 1850; recorded same date with the other.

Also a deed from said Wellborn to the plaintiff in this suit for same premises, dated 17th, January 1850; consideration \$700, recorded 22d February, 1850.

Also proved he paid the cost in the ejectment suit in Monroe.

Also proved by King's interrogatories, that Gragg was present during a term of the Court in which the action was pending. He King was employed by Richardson in the suit; filed a bill and sued a possessory warrant and received from Richardson \$110, for his services, and ten dollars to have interrogatories taken, which he used for that purpose; he pros-

ecuted the suit to recover the premises lot No. 146, in 7th district of Monroe.

Amos W. Hammond was one of the attorneys of Richardson in said ejectment cause. Gragg was present at one of the trials, and assisted in making out interrogatories for the case ; he Hammond, received from Richardson \$75 for his services. The suit was prosecuted vigorously.

J. J. Pinckard, testified he was counsel for Hill, and read on the trial a deed from James Ades, Jr., to the lot in dispute to Thomas Harris, and one from Harris to Joseph Hill, and also several interrogatories ; that Richardson read in evidence on that trial, the same deeds he has produced here. There was no collusion between counsel, but it was a full and earnest trial on the merits of the case.

Brazin, testified he saw Gragg at a term in which the ejectment cause was pending in Monroe, and Gragg told him he got his deed from J. R. Ads or Addis, and had his witnesses with him to prove the deed, if the case came up.

Defendant's counsel objected to all the evidence, proving counsel fees paid by Richardson to attorneys which objection the Court overruled and defendant excepted.

The counsel for defendant requested the Court to charge the jury, that an eviction by paramount title must be proved to constitute a breach of warranty of title. There is no proof that the plaintiff in this action was ever in possession of the land, nor is there any evidence, that there was a grant from the State to any one. There is no proof of paramount title in any one in the case in Monroe Superior Court, on which the case is founded, plaintiff is not therefore entitled to recover.

Which the Court refused, but charge in lieu thereof, that the verdict and judgment in Monroe Superior Court, presupposed that paramount title was proven to be in defendant in ejectment in Monroe Superior Court, and that the judgment was presumptive evidence of the fact.

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The balance of the request was given except the conclusion "the plaintiff is therefore not entitled to recover."

The Court was further requested to charge: That there is no proof of eviction at all of any one claiming under Gragg, the plaintiff has not proved that the party who derived title from Gragg, was ever turned out of possession under any judgment of any Court.

Plaintiff is therefore not entitled to recover.

Which the Court gave as requested, except as to the conclusion and declined to charge that "therefore the plaintiff is not entitled to recover."

The Court then, charged the jury:

1st. If you believe from the evidence that defendant Gragg and the defendant in the action of ejectment, in Monroe, both claimed title from the same grantor, then it was not necessary for the plaintiff in said ejectment cause to introduce as evidence a grant from the State. And the verdict and judgment in Monroe, presupposes paramount title in the defendant in said ejectment suit, provided you believe from the evidence that Gragg, the defendant here had notice of the pendency of said suit in Monroe.

2d. The jury will presume that the trial in Monroe Superior Court was fair, and honestly conducted. The presumption is, that the Superior Court of Monroe did its duty, and came to a correct conclusion. If the defendant relies upon fraud or collusion in obtaining the judgment, it is for defendant to show it by proof.

3d. If you believe from the evidence that defendant Gragg was in Monroe Superior Court, during the pendency of the ejectment suit, and was there with his witnesses to prove his deed, and was aware of the pendency of the suit then, such facts, if you think such proof has been made before you, is evidence of notice to Gragg of the pendency of the ejectment suit.

4th. If you believe from the evidence, that defendant made a warantee title to the premises described in his deed, warrant-

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ing the title against himself and all persons whatever, then if you believe Gragg had notice of the pendency of the suit in Monroe Superior Court, whether verbal or written, and was actually present in Monroe Superior Court, while said suit was pending; it became and was his duty to protect and defend his covenant of warranty; and he can claim no benefit or advantage here, because he failed in Monroe. But every presumption of law is in favor of the fairness and regularity of the judgment, in Monroe Superior Court, unless such presumption is repelled or rebutted by proof.

5th. If you believe from the evidence, that Gragg had notice of the pendency of the suit in Monroe, and there was an active and earnest prosecution, and no collusion or fraud—(collusion or fraud must be proved by defendant, and not presumed,) then if you believe there was a warrantee deed and a breach of warranty, plaintiff is entitled to recover; and the measure of his damages is the original purchase money with interest thereon from the date of the deed; also whatever is proved before you, that was reasonable for counsel fees, and the costs paid by plaintiff in the ejectment suit in Monroe Superior Court. To all which charges and refusals to charge, the defendant by his counsel excepted, and on the several exceptions herein contained, assigns error.

W. S. ROCKWELL, for plaintiff in error.

STUBBS & HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

In this case, Richardson, the purchaser holding Gragg's warranty, was never in possession. He sued to get the possession but failed in his suit—judgment going for his adversary, one Hill. Of this suit, Gragg had notice; and he took a part in its prosecution.

Was the judgment in this suit evidence of a breach of Gragg's warranty?

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The ordinary case is this; the purchaser goes into possession, then, the person holding the paramount title, sues him for the possession, and he notifies his warrantor of the suit; judgment, nevertheless, goes against him, and under it, he is turned out of possession.

And in this, the ordinary case, the judgment is evidence of the existence of an adverse title, paramount to that conveyed by the warrantor; and the eviction is under that judgment. In this the ordinary case, then, the judgment, and the eviction under it are together evidence of an eviction and a paramount title; and that makes the breach of a warranty.

What is the difference between this, the ordinary case, and the present case? In the ordinary case, the purchaser after getting possession is turned out of it, by a suit against him, of which his warrantor has notice; in the present, case, the purchaser can never get possession; not even by the aid of a suit of which his warrantor has notice, and in the prosecution of which he takes part.

The chance which the warrantor in the one case, has of asserting his title, is as good as the chance which the warrantor in the other case, has of asserting his title; the purchaser who is prevented from ever getting the possession, is at least as bad off, as the purchaser who having got the possession is turned out of it; a judgment against the purchaser when he brings the ejectment and vouches his warrantor, is as much evidence of an adverse title paramount to the warrantor's as is the judgment when the ejectment is brought against the purchaser, and he vouches the warrantor.

There is, then, no substantial difference, between the ordinary case, and the present case.

This being so, then, the judgment in Richardson's suit against Hill for the land, *was* evidence of breach of Gragg's warranty. It was evidence, that Richardson was kept out of possession by a title paramount to that which he derived from Gragg. To be kept out of possession by such a title as that, was a breach of the warranty.

And if this be so, it seems manifest, that the Court below was right, in the charges which it refused to give; and also in those which it gave, except one. And, with that exception, we think that the Court was right.

The exception is, the charge, that Richardson was entitled to recover of Gragg, the fees he had paid his lawyers, in the suit brought by him to recover the land.

We do not know of any law to authorize this charge. None was read to us. We, must, therefore, hold the charge as unauthorized, and, consequently, must order a new trial unless these fees are remitted.

Nothing that has been said, is to be construed as meaning, that the judgment in the suit between Richardson and Hill, is *conclusive* on Gragg.

Judgment reversed.

JACOB CARAKER, plaintiff in error, vs. J. M. & H. F. MATHEWS, defendants in error.

The Act of 1845, (*Cobb*, 88,) exempting journeymen mechanics and laborers from the process and liabilities of garnishment on their daily, weekly or monthly wages, is not repealed by the attachment and garnishment Act of 1856, and extends to overseers who, by agreement with their employers, are to be paid their wages daily or weekly, to enable them to supply the necessities of life to their families.

Garnishment, from Talbot. Tried before Judge WORRILL, September Term, 1857.

J. M. & H. F. Mathews held an execution against Hamlin Jordan. Jordan was in the employ of Jacob Caraker, as

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overseer, under an agreement that he was to be paid his wages daily or weekly, in order that he might be enabled to furnish his family with the necessities of life. Caraker paid him the wages as they accrued, under the agreement. J. M. & H. F. Mathews garnisheed Caraker. At the time of service of the garnishment, Caraker owed Jordan nothing, but still continued, after the garnishment, to pay Jordan his wages as they accrued under the agreement.

The Court charged the jury, that the Act of the Legislature, "to authorize the issuing of attachments and garnishments, and to regulate proceedings in relation to the same, and for other purposes therein mentioned," Approved March 4th, 1856, repealed the act "to exempt journeymen mechanics and laborers of this State from garnishment of their wages," approved December 27th, 1845. Whereupon the counsel for garnishee excepted to said charge of the Court, and assign the same as error.

SMITH & POW, for plaintiff in error.

R. M. WILLIS, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

By the Act of 1845, (*Cobb*, 88,) all journeymen mechanics and day laborers are exempt from the process and liability of garnishment on their daily, weekly or monthly wages, whether in the hands of employers or others. The Judge in this case decided, that the debtor was not entitled to the benefit of this Act, upon the ground that the Act of 1845, was repealed by the attachment law of 1856. It is pretty clearly to be inferred, that had he thought otherwise, he would have given to this defendant the benefit of the protection of this statute.

We have ruled several times during the present Term, that the Act of 1845 was not repealed by the Act of 1856. The

judgment in this case would, therefore, necessarily have to be reversed, unless it can be supported on other grounds.

Counsel for the creditors contends that an overseer employed as the defendant was, does not come under the Act 1845. That it applies to ditchers, and such like persons, who usually work by the day, week, or month. After exempting salaried officers of corporations from this process, as the law expressly does, it would require a very rigid construction of the Act of 1845, not to extend it to such a case as this. The defendant, for the reason that he was unable to maintain his family, unless he could get his wages daily or weekly, his employer assented to the arrangement, rating the defendant's services at \$250 per annum. The overseer entered upon his employment. During the year, his employer was garnisheed. At the date of the service of the process, he had overpaid his overseer, and was in advance to him \$8 at the time. For the rest of the year, he continued to settle with him as before. Is the employer responsible for the overseer's wages? We think not.

True, the overseer was to work for the year; still, he was to be paid daily or weekly. And the proof is, that without this stipulation, the contract would not have been made, inasmuch as the overseer's family were obliged to live. Had the creditor the right to break up this contract? Could the Courts do it? Was it not a lawful agreement? Were not the stipulations for labor and pay, daily or weekly, mutual and dependent? And to sustain this proceeding, would it not be, in effect, to hold that a third person may interpose and dissolve, at pleasure, the contracts of others? For, to deprive the overseer's family of the means of support, was, of course, to terminate the contract.

The creditor in this case claims to get his money under this contract. He must take the whole contract, not merely that which obligates the overseer to work at the rate of \$250 per annum, but also, that which entitles the overseer to be paid the *pro rata* proportion of this sum daily or

weekly. The creditor cannot claim a benefit by virtue of this contract, and at the same time seek to violate it.

It is suggested that he is paying a debt which he is bound to discharge. In point of fact, this is not true. The employer would be made to pay his overseer's debt, because, according to the agreement between them, he has furnished food and raiment to his wife and children, to save them from suffering and want. The family of the overseer is entitled to this subsistence from his hands before any creditor, I care not how meritorious his demand may be. *Women and children must have bread.* The journeyman mechanic and employees of banking and railroad corporations are exempt from this process, shall the family of the poor overseer starve who earns their daily food by the sweat of his brow? Such could not have been the meaning and intention of the Legislature.

Right or wrong, the Legislature has indicated its policy in this respect. It should not be restricted, when sought to be applied to a class quite as needy, and meritorious too, as others who are confessedly exempt. We think it no straining of the statute, to consider the debtor in this case, under his special contract, *a day laborer*, in the language of the law, entitled to daily, weekly or monthly pay.

It may be argued, that if money accumulated under such a contract, it could be reached by process of garnishment. It is reply enough to make, that none has accumulated. The money has been advanced as fast as it was earned. Under such a contract, none ever would accumulate; for the debtor, if not paid, would have sought other employment. He could not see his wife and children perish for lack of the necessities of life, and he made his contract to prevent such a result.

Again, it may be said, there will be no stopping place if overseers are brought under this Act. *I don't know that there ought to be any.* There ought to be no *class legislation* in this country. All who come within the spirit of the

Act, should be brought within its provisions. I know no reason why the employees of corporations, or even journey-men mechanics, aye, or even Irish ditchers, should have privileges, withheld from those who till the earth. The cravings of hunger can no more be appeased in the one case, than the other.

The garnishment Acts are wise and salutary provided they are confined to the exigency which gave them birth. Where debtors have effects in the hands of others, or others are indebted to them by note, account, &c., and these assets cannot be reached by levy and sale at law, this is a convenient remedy. They are liable to be greatly abused, however; and if they are to be perverted to wrenching the humble morsel from the mouths of women and children, provided by rough toil of the husband and father, then I say, let them be modified, or altogether abolished.

Judgment reversed

McDONALD, J. concurring.

BENNING, J. dissenting.

The contract was, that Jordan was to be Caraker's overseer for a year, at the price of \$250, two hundred or two hundred and fifty pounds of pork, and thirty bushels of corn—the money to be paid daily, or weekly, as it might be needed for the support of Jordan's family.

The question is, whether the debt resulting from Caraker to Jordan from his contract, was subject to garnishment for Jordan's debts.

The Court below held that it was; and I think the decision was right.

In opposition to the decision Caraker's counsel rely on the act of 1845, which is in the following words: "That from and after, the passage of this act, all journeymen mechanics and day laborers shall be exempt from the process and liabil-

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ities of garnishment, on their daily, weekly, or monthly wages whether in the hands of employers or others."

But an overseer is not, in my opinion, a journeyman mechanic or day laborer. Certainly, he is not a journeyman mechanic. Is he a day laborer? I think not.

I think he is not a "laborer" at all. As well might we say, that the superintendant of a factory, or of a railroad, or of a counting house, is a laborer.

The term, laborer, as I understand its import, is not applicable to any one who does not earn his living by the work of his hands; as, by plowing, hoeing, mowing, ditching, carrying a hod, feeding the fire of an engine, &c.

But, surely, an overseer, under such a contract as the present, is not a *day* laborer. He is bound for a year, not for merely a day, or a week. True, it may be, that his *pay* will be daily or weekly, but that does not prevent his *engagement* from being for a year. A day laborer, I take it, is one whose *engagement* to labor, is but a day long. At the end of each day, both he and *his* employer are free.

I think, then, dissenting from this Court, that the judgment excepted to, was right.

WILLIAM B. PARKER, plaintiff in error, vs. FRANCIS S. JOHNSON, administrator of Henry W. Dorsey, deceased, defendant in error.

[1.] In a case in the last resort, when the witness is in Court, and counsel on each side are to be heard on the evidence, his testimony ought to be received,

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notwithstanding the case may have been partially argued before the jury, the opposite party not being surprised by its reception.

[2.] Charge to the jury that they might find according to the weight of probability, that which ever way they believed the weight of probability to be, they might find, is erroneous; the *evidence* should so preponderate in favor of the party for whom the verdict is rendered, as to satisfy the jury that he is entitled to it.

[3.] If verdict be decidedly against the weight of evidence, new trial should be granted.

Assumpsit, on warranty, in Bibb. Tried before Judge HARDEMAN, at November Term, 1857.

Francis Johnson, administrator, sued the defendant on warranty of soundness of a negro sold by said defendant to said Johnson's intestate.

On the trial, plaintiff first introduced a bill of sale, signed by defendant and conveying to him for \$600 a negro girl named Rose, and warranting her to be sound in body and in mind, dated November 27th, 1855.

Dr. Boon testified: That at the request of Wm. P. Phillips, he made a *post mortem* examination of said negro girl, January 30th, 1856, together with Dr. Hammond, understood the negro died the night before. He found a large quantity of water in the chest near the region of the heart; the liver was greatly enlarged, and the pleura was attached to the ribs. She had evidently what is known as pericordial dropsy and no doubt died from it, and gives it as his opinion, she had had it more than three months; was satisfied it was a chronic case of long standing. He never saw her in life; found the body in possession of Wm. R. Phillips. The defendant was not present at the *post mortem* examination, nor was he or his family physician notified or requested to attend as witness was aware of. Did not examine the stomach or any part of the body except as stated. Does not remember whether the heart was found to be diseased or not.

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Pericordial dropsy is usually attended with symptoms, before it results in death, such as difficulty and shortness of breathing, depression of spirits, heaviness in the chest, palpitation of the heart, &c., and these symptoms are increased by active labor or severe exercise of any sort. It is possible for the disease to exist, however, without evidencing its presence by symptoms. Witness had no doubt that the disease existed at the time of the purchase by plaintiff from defendant.

Philips testified: That about the 27th of November, 1855, his brother Wm. R. Philips brought Rose to the place where he had Dorsey's other negroes; there was no other negro in the lot named Rose; she was the one who died 29th January, 1856. She never complained once, from the time she was brought, up to her death; was in unusually good spirits about bed time of the night she died. She ran away in December 1855, when it was quite cold, and was gone several days; don't know how long, or whether she was in the woods or not, or where whilst runaway. Said negro was well treated. Wm. R. Philips was a silent partner of Dorsey's.

Dr. Hammond testified to substantially the same facts as Dr. Boon, and stated further, that he recollected that the heart was diseased also; found it enlarged and the left auricle diseased. His opinion was, that the disease was of long standing, and had existed before November, 1855; thinks it very likely it had existed for a year.

Dr. H. K. Green testified: That the negro Rose was in his possession for the two months immediately preceding the sale of her by defendant to plaintiff; left his house the day of the sale. He employed said negro as a cook, washer, and as a house servant. She was constantly employed in cooking or washing or cleaning up the house, or in some other of the varied duties of such a servant. Said negro was not sick a day, never complained a moment that witness ever heard of, had all the appearances of a perfectly healthy negro. Witness is a practitioner of medicine, and is of the opinion that it is impossible that the disease evidenced by

the condition of the chest, as described by Drs. Boon & Hammond, could have existed whilst said negro was in his employ, because he is satisfied that she could not have done the work she did, if she had been thus diseased, without exhibiting marked and distressing symptoms of its presence. The disease described by Drs. Boon & Hammond, pericardial dropsy, is always attended with very distressing symptoms, such as shortness of breath and difficulty of breathing, a sense of heaviness in the chest, great depression of the spirits, palpitation of the heart, as well as pain, &c. Any kind of active labor or severe exercise is sure to develop such symptoms. The disease described by them might come on in a month, or even in a less time, and particularly if the patient had been much exposed to cold, &c.

Dr. Parker testified: That the negro Rose, was in his employment for the five or six months immediately preceding the time she was with Dr. Green, and did the same work which Dr. Green testified she did for him. The negro was sick not a day or an hour whilst she was with him, and never once complained, that he ever heard, except one day, she complained of a slight pain in her knee, which passed off of itself in a few hours, and witness never heard of it again. She never took a dose of medicine whilst with him, that he ever heard of, and had the appearance of being a perfectly healthy negro all the time. He is a physician, and is of the opinion that the disease disclosed upon *post mortem* examination could not have existed whilst said negro was in his employ, because, if it had, witness does not believe she could possibly have done the work she did at his house. Pericardial dropsy is always attended with distressing symptoms which are greatly increased by active labor, particularly that kind of labor which requires the body to be held for a length of time in a bending posture, such as washing or cooking.

The disease described by Drs. Boon & Hammond, frequently produces as bad a condition of the heart, liver, pleura, and chest, as was found at the *post mortem* examination,

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within three or four weeks, and often results in death in less than that time. Witness is decidedly of the opinion from the facts already given in evidence, that the negro could not have had the disease referred to, and of which it is said she died, as far back as the 27th of November, 1855.

Francis S. Johnson testified: His intestate when in life entered into an agreement with William R. Philips, by which it was agreed that Henry W. Dorsey should advance all the capital from time to time, as he might see fit, to Philips, who should lay out the same in the purchase of negroes, said Philips to buy and sell negroes with the capital so furnished, and give his time and attention to the interest of the business.

The titles to all purchases to be taken in the name of Henry W. Dorsey, and said property, and all assets arising therefrom to be and remain the property of Henry W. Dorsey, and all the business to be done in his name. Sometime after the institution of the present suit, Henry W. Dorsey died, and Johnson became his administrator and called on Philips for the property, assets and funds in his hands of Henry W. Dorsey. Philips was to receive as a mode of compensation for his services, an equal share in the profits of said business, and on that basis, witness settled with said Philips and received the claim now and then in suit, as part of said assets of Henry W. Dorsey. Witness was made plaintiff in place of Henry W. Dorsey. Witness has fully settled with Philips, except as to this and some other claims on which Philips is entitled to the one full half of what may be recovered in this suit, as a partner, and the firm debts are fully paid.

The evidence here closed; and defendant by his counsel moved the Court to nonsuit the plaintiff and dismiss his action on the ground, that Henry W. Dorsey being dead, and it being shown that Wm. R. Philips was a dormant partner of said Dorsey, the suit should be in his name, as surviving

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partner, and not in the name of the administrator of Dorsey, and that the administrator of Dorsey, had no right to recover.

The Court refused the motion, and ordered the cause to the jury.

After defendant had examined Dr. Parker, he had Dr. Gabriel Harrison, who had been subpoenaed, and was in attendance when defendant announced ready, called at the door to be examined as a witness, but the witness not responding, the case went to the jury without his testimony, and was opened by B. Hill, Esq. for the plaintiff. Clifford Anderson, Esq. followed Mr. Hill for defendant, it being understood and announced to the Court that Mr. Lochrane for defendant, and Mr. Stubbs for plaintiff, would follow in conclusion. Pending Mr. Anderson's argument, Court adjourned for dinner, and on meeting in the afternoon, and before Mr. Anderson resumed his argument, defendant's counsel stated to the Court, that during the recess for dinner, they had seen Dr. Harrison and enquired why he left before the evidence was gotten through with; that Dr. Harrison stated in reply that he left under the impression that the defendant had determined to introduce no testimony mistaking the defendant's counsel's explanatory remarks to the jury in reference to the nature of the defence, as a speech upon the merits of the case. Defendant's counsel then stated to the Court, that they had ascertained from Dr. Harrison, since the adjournment for dinner, that he would testify that he had a case in his own practice which resulted in death, when upon examination of the patient after death, the same evidence of disease substantially, were discovered in the chest, as those found by Drs. Boon & Hammond, in the chest of the negro in question, and he was satisfied that his patient was perfectly sound and healthy two weeks before his death, about which time he exposed himself greatly, and was seriously injured at a fire in the city, upon which the diseased condition of the chest, as described, supervened.

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Defendant's counsel after making this statement, informed the Court that Dr. Harrison was in Court, and moved that he be permitted then to testify, which motion the Court refused, and defendant excepted.

The Court charged the jury, that notwithstanding Philips was a dormant partner of Dorsey in the purchase and sale of negroes, and as such entitled to one-half interest in all negroes bought; yet upon Dorsey's death, the right of action upon the warranty of any negroes thus owned was in Dorsey's administrator, and not in Philips as surviving partner, &c.

That they might find according to the weight of probability; that it was generally impossible in a case like this, to arrive at certainty, and the jury were not to consider the facts as they would in a criminal case, and refuse to find for the plaintiff, because they might have reasonable doubts as to the existence of the disease at the time of the sale; that whichever way they believed the weight of probability to be, they were authorized to find.

Defendant's counsel requested in writing, the Court to charge the jury, that if Philips & Dorsey were partners in business, owning this woman, with other property, and Dorsey one of the partners died whilst they owned this woman, or after her death, then all the partnership effects and rights of action belonged to Philips as surviving partner, and Dorsey's administrator has no such interest as will enable him to recover.

That if the jury have strong reasonable doubts, whether the negro was diseased on the 27th of November, 1855, they must find for defendant.

Which the Court refused, and defendants excepted to the charge and refusal to charge, as requested.

The jury brought in a verdict for the plaintiff for the \$600 purchase money, with interest from the 30th January, 1856.

Defendant moved the Court for a new trial:

1st. Because the verdict is strongly and decidedly against the weight of evidence.

2d. Because the Court erred in not granting a nonsuit, and dismissing plaintiff's action on motion of defendant.

3d. Because the Court erred in not permitting Dr. Harrison to testify at the time when defendant requested it.

4th. Because the Court erred in refusing to charge as requested.

5th. Because the Court erred in its charge to the jury.

Because the verdict of the jury is illegal in finding interest as part of the damages.

Which motion the Court refused. Whereupon counsel for defendant excepted and assign error.

LOCHRANE, LANIER & ANDERSON, for plaintiff in error

STUBBS & HILL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

Most of the grounds taken in the motion for a new trial are abandoned in this Court, by the plaintiff in error. We shall, therefore, refer to those only on which we place our reversal of the judgment in the Court below.

[1.] At the time it was proposed to examine Dr. Harrison, one counsel on each side had to address the jury; the case was on its final trial before a special jury; the counsel for the plaintiff did not claim surprise; that his witnesses to rebut, if any, had been discharged; or the like. There was no sufficient reason brought to the mind of this Court, to require it to hold that in a case in the last resort, when the witness is in Court, and counsel on each side are to be heard on the evidence, the testimony should not be heard, notwithstanding the case may have been partially argued before the

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jury It would certainly be a more convenient practice for counsel who do not intend to waive the testimony of a witness who absents himself under the circumstances which Dr. Harrison did, to make it known to the Court, as soon as the absence of the witness is known, and to make such motion as the interest of his client requires. The majority of this Court think that the testimony of Dr. Harrison ought to have been given. I think myself that as the cause was in the last resort, and counsel on both sides were to be heard, it ought to have been received, if competent. My doubt is on that point, and I have a pretty fixed opinion, that according to the facts stated in his affidavit, it was inadmissible. It was a verbal report of a single case which had occurred in his practice, which it was proposed he should testify to. Medical books, of authority in that profession, cannot be read. *Collier vs. Simpson*, 5 *Currington & Payne* 73. If Dr. Harrison had reported his case in a Medical Journal, it could not have been read. There is a good reason for excluding particular cases. There may have been an idiosyncrasy in the subject of the treatment; the symptoms may have been fallacious; the causes producing the disease may have been different from those superinducing the disease in the case under examination, and numerous other reasons might be assigned for excluding evidence of particular cases, to influence the decision of a cause depending, often, on its own peculiar facts. The rule which admits professional opinions to be received as evidence, a kind of evidence so little reliable, and so fraught with danger to those whose rights and interests it is to affect or control, ought not to be extended. My brethren are, however, clear that the evidence was admissible and ought to have been received.

[2.] The action being on the warranty of soundness of the negro sold, whether the negro was diseased at the time of the sale and warranty, was a matter of great consequence. The evidence was conflicting on this point, and the Court

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instructed the jury, "that they might find according to the weight of probability;" that "the jury were not to consider the facts as they would in a criminal case, and refuse to find for the plaintiff, because they might have reasonable doubts as to the existence of the disease at the time of the sale; that whichever way they believed the weight of probability to be, they were authorized to find."

The plaintiff must make out his case to the satisfaction of the jury. He must not leave it doubtful, either from the circumstances which surround it, or from the character of his witnesses. *Long vs. Hitchcock*, 9 Car. & Payne 619. There was no positive evidence in the case, in regard to the commencement of the disease, or the existence of it at the time of the warranty. It depended on circumstances testified to, and some of these circumstances were conclusions of fact drawn by Medical gentlemen of skill and science in their profession, from certain indications of disease found on a *post mortem* examination of the diseased negro. Other Medical gentlemen of like skill and science, testified of their knowledge of the negro while in life, and from that knowledge, drew conclusions of fact, directly the reverse of those testified to by the physicians who made the *post mortem* examination. These facts and all other matters in proof, ought to have been well weighed and considered by the jury, and according to the weight of the evidence they should have found their verdict. We think that the charge to the jury that "whichever way they believed the weight of probability to be, they were authorized to find," is not sustained by the law, and was calculated to mislead the jury. Under this charge, the jury might have collected, on each side, every circumstance which they considered as giving rise to a probability, and putting them in opposite scales, there might have been a slight preponderance in favor of the plaintiff, but not sufficient to satisfy them that he was entitled to a verdict; and yet under the charge "that according to the weight of probability, they were authorized to find a

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verdict," they may have found the verdict rendered in the cause. Upon weighing probabilities, it might be found that there was the preponderance of a slight probability in favor of one of the parties, but not of that decided character to satisfy the mind that the right was with that party. The evidence should so preponderate in favor of the party for whom the verdict is rendered, as to satisfy the jury that he is entitled to it.

[3.] We regret when we send a cause back for a new trial, to be compelled to remark on the evidence. We find it necessary, however, when a point is made in the record, involving the proofs in the case, which it is indispensable to decide. One of the grounds in the motion for a new trial is that the verdict of the jury is decidedly and strongly against the weight of evidence. One of the principal issues in the cause, I may say the main issue, was whether the negro Rose was afflicted with the disease of which she died at the time of the warranty. She was sold, and her soundness of body and mind warranted, on the 27th November, 1855. She died suddenly on the 29th day of January afterwards, and she died of pericardial dropsy. These facts, I apprehend, are indisputable. The question in controversy is whether she was diseased on the 27th day of November, 1855. Two physicians, Drs. Boon & Hammond, think she was. They so give their professional opinion; the former that her disease was chronic and she had it at least three months before her death, and the latter, that she may have had it for more than a year. He says also, her heart was diseased. It was enlarged, and the left auricle was diseased.

The witness Philips testified, that the negro was carried to the place where he had Dorsey's other negroes, about the 27th November, 1855, and she ran away in December, and was gone for several days, when it was quite cold. She was well treated. She never complained once, from the time she was carried to the place, and was in unusually good spirits about bed time of the night she died. Dr. Boon testified, that peri-

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cordial dropy is usually attended with symptoms, before it results in death, such as difficulty and shortness of breathing, depression of spirits, heaviness in the chest, palpitation of the heart, &c. &c.; and these symptoms are increased by active labor or severe exercise of any sort. He says it is possible for the disease to exist without evidencing its presence by symptoms. This was the plaintiff's evidence on this issue, and if there had been no evidence on the other side, it clearly warranted the finding in favor of the plaintiff. Giving full effect to the professional opinions of the gentlemen examined by the plaintiff, they established a case of fatal disease at the time of the warranty, and sustain the verdict given by the jury, without referring to defendant's proof.

For the defendant, it was proven by Dr. Green that he is a practicing physician, that he had possession of the negro for two months immediately preceding the sale. She left his house on the day of the sale. She was constantly employed, when he had her, in cooking, washing, cleaning up the house, &c. She was never sick a day, and never complained for a moment that he ever heard of, and had all the appearance of a perfectly healthy negro. He gave it as his opinion, that it was impossible she could have been afflicted with the disease evidenced by the condition of the chest, described by Drs. Boon & Hammond, while she was in his employment, because he was satisfied that she could not have done the work she did, if she had been thus diseased, without exhibiting marked and distressing symptoms of its presence. The symptoms of the disease he described as Dr. Boon, saying that they always attend it, and that any kind of active labor or severe exercise, is sure to develop them. He said further, that the disease as described by them, might come on in a month or even in less time, and particularly, if the patient had been much exposed to cold.

Dr. Parker testified, that the negro was with him for five or six months immediately preceding the time she was with

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Dr. Greene, and was not sick a day or an hour while she was with him, and he never heard of her complaining, but once, and that was of a slight pain in the knee which passed off of itself in a few hours. She had the appearance of a perfectly healthy negro all the time. He is a practicing physician and did not believe that the disease discovered on the *post mortem* examination could have existed when the negro was with him, because he did not believe, that with it, she could possibly have done the work she did. He spoke of the symptoms as always distressing, and as being greatly increased by active labor. He said the disease described by Drs. Boon & Hammond, frequently produced, within three or four weeks, as bad a condition of the heart, liver, pleura and chest, as was found in this case, and often results in death in less than that time. Did not think she could have had the disease as far back as 27th November, 1855.

This was the evidence of the defendant on the same issue; and giving full effect to the professional opinions of the physicians examined by him, the disease could not have existed at the time of the sale, and the verdict of the jury could not on that evidence alone be sustained.

Each party was entitled to a verdict then, according to the testimony submitted by himself exclusively. But in arriving at a conclusion, the evidence must be collated. Dr. Hammond, the record says, substantially supported the evidence of Dr. Boon, and he must therefore be taken to have described the symptoms of the disease as he did. There is nothing in the record before us to show that the witnesses testifying in the cause are not all entitled to equal credit. We will refer to the testimony. According to Dr. Boon's evidence, the general rule is that pericardial dropsy is attended with symptoms before it results in death. But he says, it is possible for it to exist without its evidencing its presence by symptoms. Its existence without symptoms is an exceptional case, then, as such case is *possible* and not *usual*. The

plaintiffs witness, Dr. Boon, says, the symptoms *are increased by active labor and severe exercise*. Dr. Green for defendant, says, *that any kind of active labor or severe exercise, is sure to develop them*. There is no discrepancy in this testimony. It may stand together. Dr. Boon does not say that this disease, if existing in a subject living in a quiet state, indicating no symptom of its presence, would not be *surely* developed, if that subject were put to active labor or severe exercise. If this be true, and the testimony of the witnesses, in this respect, may be reconciled in this way, the verdict is decidedly against the weight of evidence; for the evidence of the defendant is, that the negro was kept in active service performing labor down to the day of sale, and exhibited no symptom whatever of disease, and had all the appearance of health. After the sale, for two months and two days, she had led an inactive, quiet life, and down to the night of her death, made no complaint, and exhibited no symptom indicating the presence of the disease.

If, with labor and exercise, the disease would always be developed, and without them, it might not, the inference would be, that it had its origin after her habits of labor and exercise had ceased. In respect to the abstract professional opinions of the witnesses, which I shall not attempt to reconcile, I will remark that, if they be irreconcilable, they balance each other, as the witnesses are equal in number, and nothing appears in the record to entitle the witnesses of one party to more credit than the other.

Judgment reversed.

The Mayor and Council of Macon vs. Hays, adm'r of Shaw.

THE MAYOR AND COUNCIL OF THE CITY OF MACON, plaintiff in error, vs. **SAMUEL HAYS**, adm'r, &c., of **HARVEY W. SHAW** defendant in error.

If the city authorities remove its Marshal for a *specified* cause, and it be determined that such cause did not warrant the removal, and the Marshal sue for his salary and fees, the city authorities may aver and prove other matters good in law to justify the removal.

Assumpsit from Dobb. Tried before Judge LAMAR, May Term, 1858.

Shaw was removed from the office of City Marshal, and brought his suit for the salary and fees which belonged to the unexpired part of his term.

Defendant pleaded neglect of duty on the part of plaintiff, in not reporting offenders against the law punishing gambling, and gambling on the part of plaintiff himself, while in their employ as Marshal, &c.

On the trial, the reports and decisions of the Supreme Court in this case, and the evidence reported therein, were read by plaintiff, under agreement of counsel, which are to be found in the 16 *Ga.* 172, and in the 21 *Ga.* 280, and in the latter volume, the evidence of A. R. Freeman was read instead of of using him on the stand.

Benjamin Allen testified, that the perquisites of the office of Marshal, for the year 1853, amounted to at least two dollars a day. Plaintiff here closed.

The defendant offered to introduce *Victor Menard* to prove that Shaw, while acting as Marshal in 1853, saw John Chain and others, bet and play cards for money, and did not prosecute them. The Court refused to admit it. Whereupon defendant's counsel excepted.

The case proceeded, and to many of the rulings, charges of the Court, and refusals to charge, defendants excepted, and assign the same as error. All of which, except one, are omit-

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ted, as the judgment of the lower Court is reversed upon the exception taken to the ruling out of the testimony of Menard.

The verdict was for plaintiff, whereupon defendants tender their bill of exceptions.

POE & GRIER, for plaintiff in error.

LANIER & ANDERSON; and STUBBS & HILL, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

The defendant's intestate was Marshal of the City of Macon, in the year 1853.

The Mayor and Council of the City removed him from office, determining, that by gambling within the corporate limits, he had been guilty of mal-practice in office and neglect of duty. The Judge of the Superior Court of Bibb county, upon a writ of *certiorari*, quashed the proceedings of Council, and his judgment was affirmed by this Court, 16 Ga. Harvey W. Shaw, the dismissed Marshal, the plaintiff's intestate, instituted suit for the recovery of his salary for the balance of his term remaining unexpired at the time of his removal, and for the fees to which he would have been entitled, if he had not been removed.

On the trial, the defendant offered to prove by *Victor Menard*, that the plaintiff's intestate, while acting as Marshal in 1853, saw certain persons bet and play at cards for money, and that he did not prosecute them. The Court refused to admit this evidence and defendants excepted. The presiding Judge excluded the evidence, no doubt, on the view which he took of the judgment of the Court above cited, in which it was held that the Marshal was improperly removed for the cause specified in that record. When he sues for his fees, however, the case comes up in a different aspect, and the defendants may plead and prove any cause which would jus-

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tify the removal, so far as it respects his duties as an officer of the corporation. To violate a public law, may not be a breach of duty as such officer, and that is all that this Court decided in the case first brought up. But if there was other good cause for the removal of the intestate, as Marshal, there is no good reason why the case should not be defended on that ground. If his term of office had not expired, when this suit was instituted, and he had moved for a *mandamus* to restore him, instead of bringing an action for his salary and fees, the Court would not have interfered, if good cause for his removal would have been shown, although he may have been removed without notice. *Rex. vs. Mayor & C. of Axbridge*, 2 Cowper 523. *The King vs. the Mayor & C. of London*. 2 Term Rep. 182.

This Court has held that for offences committed, in his presence, within the corporate limits of the city, it was the duty of intestate as Marshal to prosecute without notice. It was the object of the witness *Menard's* evidence to establish a breach of duty in that respect. If such evidence would have been admissible against him on an application to be restored to office, it is certainly admissible to disprove his right to salary and fees, for if he was not entitled to his office, he could not be entitled to salary and perquisites.

Judgment reversed.

J. L. LARAMORE, et al., plaintiffs in error, vs. J. M. CHASTAIN
defendant in error.

[1.] This Court will not interfere with the order of business, unless it appears that the presiding Judge exercised his discretion in that respect illegally.

[2.] If a party acknowledge service, at the appearance Term of the Court, of the process and complaint, he shall not be allowed to dismiss the cause for want of service, at the trial Term.

Complaint from Lee. Tried before Judge ALLEN, September adjourned Term, 1858.

When this case was called, counsel for defendant objected to taking it up because it was not in its order, but called at the instance of the Attorney for plaintiff. The Court overruled the objection and defendants counsel excepted.

It appeared that acknowledgment of service was made by Laramore, one of the defendants at appearance Term. That the Sheriff had not served him in consequence of an agreement that he would always acknowledge service, on any case against him, and he did sign this acknowledgment in pursuance of that agreement.

Defendant's counsel moved to dismiss the writ for want of proper and legal service.

The Court overruled the motion and defendants excepted. Upon these exceptions error is assigned.

FRED. H. WEST, for plaintiffs in error.

WARREN & HUMPHRIES, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] It does not appear in this record in what respect the cause was called out of its order, and without evidence before us that the Court exercised his discretion in ordering the business of the Court illegally to the prejudice of the party complaining, we will not interfere with him.

[2.] At the request of the defendant who is plaintiff in error, the Sheriff did not serve him with the process and copy complaint, on the promise that he would acknowledge service. He did acknowledge service at the appearance Term.

Baker and Wife and others vs. Bush, adm'r.

At the trial Term he moved to dismiss the cause for want of due and legal service. The Court refused the motion and we affirm his judgment.

Judgment affirmed.

MORRELL BAKER and WIFE, and others, plaintiffs in error, vs.
DAVID B. BUSH adm'r. of **SUSANNAH ALEXANDER**, defendant
in error.

An administrator may retain a debt due to himself from his intestate, though the debt was barred by the statute of limitations, at the death of the intestate.

Equity from Talbot—bill for account. Decision by Judge
LAMAR, March Term, 1858.

The complainants, plaintiffs in error filed their bill against the defendant to compel him to account to them as the distributees of his intestate, for their distributive shares of the estate in his hands. After argument had, the Court charged the jury: "that the administrator had a right to retain, for a debt due to himself, though barred at the time of the death of the intestate by the statute of limitations." Whereupon counsel for complainants excepted to said charge and assign the same as error.

SMITH; and **INGRAM & RUSSELL**, for plaintiffs in error.

JOHNSON; and **BETHUNE**, for defendant in error.

By the Court.—**BENNING**, J. delivering the opinion.

Is an executor or administrator bound to plead the statute of limitations to a suit against him, on a cause of action

barred by the statute, at the death of the testator or intestate?

It is certain that he is not, if the *letter* of the statute is to govern.

And it seems certain, that he is not, if decided cases are to govern. *Norton vs Fluker*, 1 *Atkyns* 526. *Castleton vs. Fanshaw Prec. Ch. Ex-parte Dewdney* 15, *Ves.* 498. *Wms. Ex'ors* 1283. (1535.)

Shewen vs. Vanderhorst (1 *R. & M.* 347,) is hardly to the contrary. In that case "the Lord Chancellor, (Lord Brougham,) held that after a decree for an account of debts, &c., had been pronounced, and the Court by that means had taken possession of the estate, the statute of limitations might be set up in the Master's office, as well by a creditor or legatee as by a personal representative." 2 *Dan. Ch. Pr.* 157 When the Court has acquired possession of the estate the case becomes altered. The Court then by the Master becomes itself the representative of the estate, and the question whether the statute shall or shall not be pleaded, becomes one for him, and ceases to be one for the executor, (or administrator.)

"Whether the Master himself is bound to take the objection, is a question which was discussed in the above case, but his Lordship declined giving any opinion upon it." *Id. Ibid.*

If principle be made the test, it would seem, that the executor or administrator is not bound to plead the statute. The testator or or intestate is not bound to plead it; and the executor or administrator stands in his place.

We think, then, that an executor or administrator is *not* bound to plead the statute.

Of course if he is not bound to set up the statute against a debt due from him to a third person, he is not bound to set it up, against a debt due from him to himself in his individual character, but is at liberty to *retain* the amount of that debt.

Judgment affirmed.

WILSON GALLOWAY, plain'iff in error, vs. THE STATE OF GEORGIA, defendant in error.

- [1.] Where there are cross indictments, the acquittal of the defendant who is the prosecutor in the case about to be tried, is no ground for a continuance; nor is the fact that the prosecutor is a member of an influential family, and of the party in the majority, and politics to some extent was mixed up with the trial which had taken place, and had given rise to excitement.
- [2.] Error cannot be assigned on the conclusion of fact of the presiding Judge acting as trior.

Assault with intent to murder, from Twiggs. Tried before Judge LAMAR, March Term, 1858.

Wilson Galloway was indicted for an assault with intent to murder, and put upon his trial at the March Term of Twiggs Court, 1858, and found guilty. His counsel moved for a new trial on the following grounds:

1st. Because the Court erred in not granting a continuance of the case, when defendant stated under oath, that he could not safely go to trial at said Term, for that the defendant was the injured party, and on whom, and against whose habitation the offence was committed, for which the said Andrew J. Smith was tried and acquitted on the day before. That said Andrew J. Smith is a member of a very influential family in said county, and the political questions of the day have been to a very great extent mixed up with said case, and operating against him, and would prevent him, the defendant, from getting a fair trial at said Term of the Court, and that he, the defendant, being a member of a political party, in the the minority at that time in said county, and said difficulty having originated in political differences, and the public mind being excited against defendant, he could not safely go to trial at said Term of the Court, and that he did not make the application for delay, but solely for the purpose of getting a fair trial.

2d. Because the Court decided Britton Oneal to be a competent juror, when said Oneal was the overseer of B. B. Smith

up to the death of Smith in June, 1857, and then continued as overseer and hand until Christmas after, at the homestead; that A. J. Smith resided during this time at the homestead; that the juror was, at the time of the trial, an employee of the brother-in-law of prosecutor, and the wife of said brother-in-law, and sister of prosecutor, and injured party, is still living.

The juror made himself competent under the statute, in his answers to the questions prescribed, and he was put upon the Court as trior, and the Court remarked, in its decision, that the juror had said or done nothing to impeach himself, and seemed intelligent, and comprehended fully the questions propounded, and the moral as well as legal responsibility of his oath.

3d. Because the Court erred in deciding that John W. Cowan was an incompetent juror. Cowan was one of the regular panel of petit jurors, and made himself competent in his answers to the questions prescribed. The State submitted him to the Court as trior, and it appeared that said juror was on defendant's bond, for his appearance at that Term of the Court.

4th. Because the Court erred in its charge to the jury, when the Court read to the jury the different provisions of the penal code, in relation to murder, malice, manslaughter, justifiable homicide, killing in self defence, and the 13th section of the 4th division of the code, in relation to fear, &c., and commented on the same; none of which comments were excepted to, save the following:

That if two persons, in a sudden quarrel, and under the violent impulse of passion, supposed to be irresistible, fight at once, or immediately go to an appointed place to fight while such passion thus continued, and no undue advantage is taken or sought, and one killed the other, although this might be only manslaughter, yet if, upon agreement, after such falling out or going at once to the appointed place to fight, they do not execute their purpose, but defer the fight

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until the next day, and then fight with swords or other weapons, whereby one is killed, such killing would be murder, because there would be sufficient time for the passions to subside, and the voice of reason and humanity to be heard

The Court overruled the motion for a new trial, and the defendant by his counsel excepts.

STUBBS & HILL; SCARBOROUGH & LOWRY, for plaintiff in error.

DEGRAFFENRIED, Sol. Gen. *pro tem.*, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] This cause is brought up from Twiggs Superior Court for alleged error in the judgment of the Court, refusing the plaintiff in error a new trial. The grounds of the motion are fully set forth in the foregoing statement.

The first ground in the rule is the alleged error of the Court in refusing a continuance of the cause, on the motion of the plaintiff in error. There were cross indictments. The defendant in this indictment, had prosecuted Andrew J. Smith, (who is now the prosecutor,) for assault with intent to murder. He had been tried and acquitted on the previous day. His acquittal was one of the grounds on which the continuance was moved. It by no means follows from the acquittal of Smith, that the defendant in this case was guilty, and there is nothing in the application to show that the jury, on the trial of this case, had to pass on the same evidence. If there was, it might be a cause of challenge to the jurors, but certainly it is no ground on which a continuance should be granted. It was further urged, as a ground of continuance, that the prosecutor, Smith, on whom the assault is charged to have been committed, is a member of a very influential family in the county; that the defendant belongs to the party in the minority; and that the political questions of the

day had, to a considerable extent, been mixed up with the trial in the other case; and that the public mind being much excited against him, he could not go safely to trial. We cannot recognize, in these specifications, a good ground for a continuance. Because a person belongs to an influential family, or a political party in the majority, and because there is much political excitement, the individual who assaults him is not to escape a trial because the family influence and political power in the county, he fears, may have undue weight against him on his trial. How long is the trial to be delayed—for the weakening of the family influence, the change of political majorities, or the subsidence of party excitement? There is no authority to support such an application.

[2.] The second ground in the rule for a new trial is, that the Court, acting as trior of the competency of Britton Oneal as a juror, found him competent. He was confessedly competent under the rule prescribed by the statute for testing the competency of jurors, and the Court found him competent, upon the evidence submitted to impeach his competency, and the decision of the Judge, as trior, can no more be made a ground of error before this Court, than the verdict of triors could have been, prior to the late statute.

If the presiding Judge should mistake the *law*, and by such mistake a prejudiced or unqualified juror *should be empanelled* to try the prisoner, it would be different. It does not appear that an objectionable juror was of the panel which tried this plaintiff in error. Britton Oneal, as appears in the record, was not on the jury.

The same remarks apply to the rejection of Cowan as a juror. The Judge acted as trior, and error cannot be assigned on his conclusions upon the facts. We will add, that if the Court had decided him to be a competent juror, it does not follow that the defendant would have had him as one of the panel to try him. The State might have set him down. But suppose the Court were to send a cause back, for the

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reason that the rights of the defendant had been violated by the rejection, as incompetent, of a person returned on the *venue* as a juror, or summoned as a tales juror, it does not follow that that wrong could be remedied by the reversal of the judgment, for the effect of a reversal would not be to give him, on his next trial, the rejected juror. The presiding Judge put his decision on the fact, that Cowan was security for the prisoner on his bond, and held that that was evidence of bias in his favor. We would not overrule his conclusion, when so strong a reason is offered to support it, even if our power admitted it.

We find no fault with the charge of the Court. The charge excepted to was a supposititious case, put by the Court, to illustrate to the mind of the jury, the law of malice.

There is no conflict between the verdict of the jury and the charge of the Court, and no legal mind can, for a moment, entertain a doubt in regard to the verdict of the jury on the law and evidence.

Judgment affirmed.

FRENCH & AVEN, plaintiffs in error, vs. CHARLES CAMPBELL,
defendant in error.

P. sued M., and garnished A. & F., who answered, that they had made to M., their negotiable promissory note. This garnishment was served before the note fell due. Afterwards C. sued A. & F., (the makers,) on the note, who pleaded and proved the garnishment, the judgment thereon, and payment of the judgment; and asked the Court to charge the jury, that the *onus* was on C. to show that he obtained the note, before the service of the garnishment on them.

Held, that the Court erred in not so charging.

Complaint, from Marion. Tried before Judge WORRILL,
March Term, 1858.

Turner D. Patterson sued John K. Moore, and garnisheed French & Aven, who answered, that they owed the defendant, Moore, an amount of a promissory note given him by them. Upon this answer judgment was entered against them, which they paid, for the full amount of said note.

This note being in the hands of Charles Campbell, he brought his action against French & Aven thereon, and on the trial, read his declaration and note, and closed his case.

Defendants pleaded full payment of the judgment founded upon said note, and their answer as garnishees, before the same came into the possession of the plaintiff, and introduced in evidence the original summons of garnishment, showing the service to have been before the note fell due, also their answer to the same, also the order of Court commanding them to pay over the money into Court, and that the same be applied to the payment of Patterson's debt.

The Court charged the jury, that defendants pleaded a judgment in bar of the plaintiff's recovery in the action, which judgment it is admitted was obtained by Patterson, on their answer as garnishees, in which answer they admitted their indebtedness to Moore on the note. This judgment is no bar to the plaintiff's right of recovery, unless it appears that Moore was the owner of this note at the time the garnishment was sued out, or that the note was negotiated to the plaintiff after it fell due.

Defendants' counsel then requested the Court in writing, to charge the jury, that before they can find for the plaintiff, they must be satisfied from the evidence, that the plaintiff came into the possession of said note, and was a *bona fide* holder thereof, before the summons of garnishment was served on the defendants, and that the *onus* was on the plaintiff, and not the defendants, to show this fact, and if the plaintiff has failed to prove this fact, they must find for the defendants; which the Court refused, and to both the charge

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of the Court, as given, and the refusal to charge as requested, defendants' counsel excepted, and assign the same as error.

WM. D. ELAM, for plaintiff in error.

JOHN R. HILL, for defendants in error.

By the Court.—BENNING, J. delivering the opinion.

The exception urged before us, is to the refusal of the Court to give the request in charge to the jury. And the question on that refusal is, whether it is not true, "that the *onus* was on Campbell to show" that the note came into his hands before the service of the garnishment on French & Aven, the makers of the note.

It is certainly true, as his counsel insists, that the *law* presumes the time of the transfer of a negotiable note, to have been before the note fell due. But in this case, the time also of the service of the garnishment, was before the note fell due. It may well be true, therefore, in this case, that the note was transferred to Campbell before it fell due, and yet not until after the service of the garnishment on French & Aven. The question, then, is not settled by an appeal to this presumption of law.

His counsel also insists, that "in an action by the endorsee against the maker of a promissory note" (negotiable) "if the defendant sets up payment he must prove the payment to have been made *before* the endorsement, or his defence will fail him."

This likewise may be true, as a general proposition. It is usual for the maker, when he pays his note, to take it up. In the case in which he does not take it up, it is fair to presume, that the note was not in the hands of the person to whom he paid it at the time of the payment, but had then been already passed off into third hands.

But the present is a different case. It is a case in which, the makers had to pay the note, not to the holder, (payee,) but to a creditor of his; more, it is a case in which, they had to pay it under a process of law, which was operating on them from a time before the note was even payable—the garnishment having been served on them before the note fell due. It could not be in their power therefore, to take up the note either when they paid it, or previously, when the garnishment began to act on them. That the makers of *this* note have not taken it up, therefore, does not authorize any presumption, that the note had been negotiated before the service of the garnishment.

On the score of equity, garnishees are entitled to rank with the most favored. On that score then Campbell the transferee of the note, has no ground to ask for any discriminating presumption in his favor, against French & Aven, the makers.

It is easier for him to show when he obtained the note, than it is for them to do so.

And then, on the plaintiff is the general *onus* of making out his case. See *Harvey vs. Mason & Dibble*, 20 Ga. R. 477.

On the whole, we think it true, according to the request, that the *onus* was on Campbell of showing that the note came into his hands before the service of the garnishment on French & Aven, and, consequently, we think, that the Court erred in refusing to give the request in charge to the jury.

Judgment reversed and a new trial ordered.

McGuire et al. vs. Johnson.

DANIEL J. MCGUIRE et al., plaintiffs in error, vs. WILLIAM J. JOHNSON, et al., defendant in error.

- [1.] The Superior Court may order its Clerk to revise and review a judgment for costs, and order them to be retaxed.
- [2.] A party cast in the Supreme Court liable for the costs in that Court; and if he eventually succeed in his cause in the Superior Court, he cannot recover them.

Costs. Decided by Judge LAMAR, November Term, 1858.

McGuire et al., sued William J. Johnson in complaint for land. This case was carried by defendant to the Supreme Court three times and reversed each time; and each time defendant when said case came back, obtained judgment for all the costs which had accrued in both Courts; and the fourth time it was carried up the judgment of the Court below was affirmed, and plaintiffs upon the return of the remittitur entered their judgment for all the costs which had accrued during the progress of the entire case, up to final judgment.

The motion was to retax and review the entire costs in said case; the Court held and ordered that the said defendants in the complainant, Wood & Johnson, were entitled to recover back from plaintiffs the costs they paid for each time they carried said case to the Supreme Court, and obtained a reversal, although plaintiffs finally gained and prevailed in said case; and that their three judgments for costs were valid and unsatisfied, and they were entitled to enforce and collect the same.

Plaintiffs excepted and assigned error.

LANIER & ANDERSON, for plaintiffs in error.

STUBBS & HILL, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

The plaintiffs in error, denied the power of the Court below to hear a motion to review and retax the costs in the case, inasmuch as a judgment had been entered for the same by the Court having competent jurisdiction to award the same, which remained in the Court unreversed, and a *fi. fa.* had been issued thereon.

[1.] The Court decided that it had the power, and error is assigned on said decision. We entertain no doubt of the power and jurisdiction of the Superior Court, to hear a motion in Term time, to set aside a judgment entered at a previous term of said Court for costs, and to have the costs retaxed, if an illegal judgment had been entered up, and to order the writ of *fi. fa.*, issued for the same, to be returned and cancelled.

[2.] At each time that the cause on which this controversy arises was brought to this Court, the plaintiffs in error paid all costs which had accrued in the Circuit Court up to the judgment complained of. When the judgments of reversal were respectively remitted to that Court, they entered up judgments against the defendants in error, who were plaintiffs in that Court, not only for the costs which had accrued thereon in this Court, and the expenses of bringing it up, such as transcribing and certifying the record, &c., but for the ordinary costs which had accrued in the Court below, which constituted no part of the costs of bringing the cases to this Court. When the plaintiffs in the Court below, finally succeeded by the affirmance of the fourth judgment rendered in their favor in that Court, they entered up judgment and had execution for the costs which had accrued in all the cases, both in this Court and the Court below. The counsel for defendants in the Court below moved to have this judgment and writ of *fi. fa.* set aside, and that the costs be revised, reviewed and retaxed by the Clerk. The Court on hearing evidence from the Clerk of the Superior Court, that the

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Plaintiffs excepted and assigned error.

LANIER & ANDERSON, for plaintiffs in error.

STUBBS & HILL, for defendant in error.

of the cause to be paid by the plaintiff in error in this Court, which includes those expenses which are *necessary* to bringing it here, such as attend the suing out a bill of exceptions, procuring the transcript of the record, &c., but it does not apply to the costs which have accrued in the Court below, which the plaintiff in error may pay or not as he chooses, but which he is not compelled to pay, unless he wishes to obtain a supersedeas: *Brewer vs. Brewer*, 6 Ga. 587. I believe, in practice, expenses of the Clerk in the Court below are never collected in this Court. These costs, the costs incurred by bringing the cause to this Court, must be paid by the party, by process to be sued out in the Court below, against whom the judgment of reversal is pronounced in this Court. There is no authority for taxing them against the party who may be eventually cast in the Court below. It is the fault of the party who insists on the erroneous judgment, and he must pay the penalty. It is otherwise, however, in regard to costs which have accrued in the cause in the Court below. According to usage and practice, and we may say law, the party eventually cast in that Court must pay all costs which accrue in the cause there. In this case, the defendants who were plaintiffs in error in each of the causes brought to this Court, paid all costs which had accrued in the Circuit Court up to the time of the judgments complained of, and they seek now, though finally cast in their suit, to recover from the plaintiffs that portion of the costs as well as the costs in the Supreme Court. That they cannot do.

The party who finally loses the case in the Superior Court, must pay all costs which have accrued in that Court, excluding therefrom all costs and expenses to which he may have been exposed in carrying the cause to the Supreme Court, in case, in that Court he obtained a judgment of reversal.

Judgment reversed

Holman vs. Carhart, Bro's & Co.

DAVID HOLMAN, plaintiff in error, vs. **CARHART, BROS. & CO.**,
defendants in error.

[1.] A plea by one of two persons sued as partners, that he did not sign the note sued on, or authorize any other person to sign it for him, and that he was not one of the partners, when the debt was contracted, is not a plea in abatement, but a plea in bar.

[2.] *Collier vs. Cross*, 20 Ga. R. 1, remarked on.

Complaint, from Randolph county. Tried before Judge KIDDOO, May Term, 1858.

Carhart, Bro's & Co., sued John W. Shropshire, David Holman and Christopher Holman, as partners, doing business as "Shropshire & Holman," on a note and account against said firm.

At the trial Term, David Holman filed his plea denying that he was a member of said firm at the time the debt sued on was contracted, and that he was not liable therefor, and moved to continue the cause as to himself, for the absence of Christopher Holman, against whom the suit was not progressing, he not being served, by whom he expected to support his plea, and made the usual oath for a continuance.

The Court overruled said motion, on the ground that the plea filed was in abatement and must be filed at the first Term, and the witness could not be permitted if present, to testify in support of the plea.

To which counsel for Holman, excepted.

On motion of plaintiff, the plea of defendant, Holman, was then stricken, and defendant by his counsel excepted and assigns error.

GEO. L. BARRY, for plaintiff in error.

HOOD & ROBINSON, for defendants in error.

By the Court.—BENNING J. delivering the opinion.

The plea of David Holman was, that he did not “sign” the note, or authorize any one to sign it for him, and that he was not a partner in the firm of Shropshire & Holman at the time when the debt was contracted and the note given.

[1.] Surely this is not a mere plea in *abatement*. It must be a plea in bar. The word “sign” is used in place of the more usual and more comprehensive word, make; but that, if a defect, is amendable; at all events, is not a thing to make the plea, a plea in abatement. It is a plea intended “to deny” the “note” sued on. A plea denying the note sued on, is a plea in bar.

[2.] In *Collier vs. Cross*, this Court held, (Judge LUMPKIN not presiding,) that a somewhat similar plea was not good; but did not hold that it was a plea in abatement. And that decision I now think wrong, unless there were some facts not reported, to support it, I must think, however, that there were some such facts, although, I cannot remember any. I must think, that the plea lacked being sworn to, or that there was some other special ground of objection to it. See *Straus vs. Barry & Co.*, decided at this Term.

If the plea in the present case was a plea in bar, it is clear, that the motion for a continuance ought to have been granted; and it is equally clear, that if the plea was defective, it was amendable, and ought not to have been struck out, provided an offer to amend it was made.

Judgment reversed and a new trial ordered.

Jones vs. The Mayor and Council of the city of Columbus.

SEABORN JONES, plaintiff in error, vs. THE MAYOR AND COUNCIL OF THE CITY OF COLUMBUS, defendant in error.

- [1.] The title of an Act amending a former Act of the Legislature, may be looked to, as well as that of the original Act, to ascertain if the amending Act has any matter different from what is expressed in the title.
- [2.] A city having the right to tax slaves employed and laboring in the city, belonging to persons resident out of the city, may discriminate in the amount of tax imposed on them respectively.
- [3.] The Mayor and Council of the City of Columbus, have no power to impose a tax on real estate within the city, to pay the city bonds issued to build the Mobile and Girard Railroad, there being no Act of the Legislature authorizing it.

Illegality, from Muscogee county. Decision by Judge WORRILL, May Term, 1858.

Seaborn Jones filed an affidavit of illegality to certain executions, in favor of the Mayor and Council of the city of Columbus, against him, on the grounds:

1st. That the defendant resides without the limits of the City of Columbus, and the Act which authorizes said Council to levy taxes on the property of citizens and residents of said city, and the other Acts amendatory of the same, contain matter different from their title, and are unconstitutional.

2d. That one of the executions is for tax on negroes of defendant hired in said city, and more tax is imposed on that kind of property belonging to non-residents, than on that of residents within the limits of the city.

3d. That a tax is levied for the purpose of paying bonds issued by the City Council of Columbus, for the building of the Mobile and Girard Railroad, and said Council had no authority to levy such tax according to the law.

On the hearing, the Court overruled said affidavit and ordered the executions to proceed.

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Whereupon, said Seaborn Jones excepted, and assigns error.

JONES & JONES, for plaintiff in error.

HINES HOLT; and THOS. SLOAN, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The plaintiff in error resides without the limits of the City of Columbus, and he insists that the existing Acts of the Legislature authorizing the Mayor and Council of that city, to raise revenues for any purpose, from the property of persons non-resident in the city, are unconstitutional, and that, therefore, the tax imposed on his property within the limits of the city, is illegal. The alleged ground of unconstitutionality is, that the Acts, so far as they impose a tax on the property of non-residents of the city, contain matter different from what is expressed in their title. The title of the Act of 1841, confines its purpose to the imposition of a special tax on the persons and property of the city of Columbus, residing and being within the same; but the Act of 27th December, 1845, according to its title, is "to raise a revenue for the City of Columbus, amendatory of the Act of 1841." The part of that Act which imposes a tax on slaves employed and laboring in the city, belonging to non-residents of the city, is repealed by the Act of 1847, which latter Act immediately imposes another, but lower tax on the same description of property. The title of the Act of 1847, is to amend the Acts of 1845, and recites the captions of both Acts. The title of the Act of 1845, recited in the caption of the amending Act of 1847, "to raise a revenue for the City of Columbus," is broad enough to admit any provision for that purpose in the body of the Act, and the addition of the words "amendatory of the Act of 1841," cannot restrict the power of the Legislature to the objects of the Act of 1841, as ex-

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pressed in its title. That Act was to impose a special tax; the Act of 1845, was to raise a revenue. The Act to impose a special tax, it was deemed, did not go far enough, and in the title to the new Acts, the object was expressed in the broadest terms, so as to admit of any taxation by the Legislature, or of any provision to authorize taxation by the Mayor and Council of the City of Columbus, within its constitutional power to grant.

[2.] Obvious reasons, founded in a justifiable policy, may require the authorities of a city to discriminate, in imposing a tax on slaves within their jurisdiction, between the tax on slaves of resident and non-resident persons. If they have the power of taxation, and their discretion in that respect is not limited, it cannot be interfered with, so long as they keep within the pale of the Constitution and laws.

[3.] We do not find, in any of the Acts, authority given to the Mayor and Council of the City of Columbus to levy a tax to pay bonds issued by them for building the *Mobile and Girard Railroad*. Without the delegation of such authority, it is very certain, apart from any other consideration, that such power cannot be exercised. The presiding Judge in the Court below, we must therefore say, erred in overruling the ground in the affidavit of illegality, which made that objection to the levying the tax.

Judgment reversed.

ROBERT RIVES, guardian of John N. Massey, plaintiff in error, vs. DUDLEY SNEED, defendant in error.

1.] After the Superior Court has passed an order under the Act of 1856, making a child the adopted child of a person not his parent, if the same Court have the power to rescind the order, it is a matter of discretion with which the Court cannot control.

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[1.] An Ordinary has no jurisdiction to appoint a guardian for an infant whose residence is out of his county.

[2.] The adopted father of a child is as much entitled to the custody of his person as his actual parent.

Motion to set aside order and judgment of Court changing name of minor &c., from Lee county. Tried before Judge ALLEN, April Term, 1858.

At a prior Term of the Superior Court of Lee county, upon the petition of Dudley Sneed, John Needham Massey, a minor, six or seven years old, had been declared his adopted child, his name changed to John Needham Massey Sneed, and the rights of each to be the same as if the said minor had been born the natural legitimate child of the said Dudley Sneed. This proceeding was had under the Act of 1855-1856.

At the next Court Robert Rives presented his petition, showing that he was the regularly appointed guardian of said minor and had been since the 3d of October, 1855, and that said Sneed, upon an *ex parte* application, obtained the judgment of the Court before recited, without the knowledge, consent or approbation of the plaintiff or the said minor or his friends; and that said judgment was unjust and illegal, because :

1st. It deprives plaintiff of vested rights secured to him by letters of guardianship granted before said judgment was obtained, and previous to the Act of the Legislature under which said proceeding took place.

2d. That by said judgment, defendant acquired valuable rights from said minor, without any fair equivalent to said minor.

3d. That by said judgment said child loses its name, and thus is estranged from its family and friends, to the great mortification of its father's nearest relatives, at whose solicitation and entreaty this protest is made.

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4th. That said minor is possessed of sufficient property, together with the proffered aid of friends and relatives of his father, to provide for him comfortably and for his proper intellectual and moral training, and is not dependent upon the kind intentions of a stranger to his blood and name.

5th. That said judgment deprives petitioner of the custody, care and control of said child, confided and committed to him by the proper authority of Randolph county, with the consent of its paternal and maternal relatives, and confides the same to a stranger to his blood.

6th. That the Act of the Legislature is not only unjust and unwise, but unconstitutional and void.

Wherefore, he prays that said judgment may be vacated and set aside.

Whereupon the Court granted an order that defendant show cause why said application should not be granted, &c., and all proceedings under said judgment be stayed until further order.

Defendant appeared and pleaded, that the Court there had no jurisdiction of the matter, because the question as to the validity of the judgment had been carried to the Supreme Court.

That the proper mode to test said judgment was by bill of exceptions to the Supreme Court.

That, by said judgment, both defendant and minor acquired vested rights which this Court cannot defeat.

Answering, he says, that it is not true, as stated in said rule, that plaintiff is the legal guardian of said minor; that Needham Massey, father of said minor, in the year 1854 died intestate, leaving a considerable estate of the value of—, residing at the time of his death in the county of Dougherty; that some time previous to his death, by marriage contract with his wife Lydia, the mother of said minor, he appointed and nominated Jesse Cock, of Lee county, brother of said Lydia, trustee and guardian of the person

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and property of said minor; and said Cock accepted the appointment and has acted under it until now, superintending the child's property. At the death of said Lydia, which took place in the year 1852, the said minor, then 18 months old, was brought to the house of defendant by consent of father and guardian of said child, where he remained until 6th August, 1857, when, without the knowledge or consent of defendant or his wife, and while the said child was away from defendant's home, he was carried away by Sarah Rives, the wife of plaintiff, and against the will and consent of the child; that during the lifetime of said Massey, the child's father, he was willing and anxious to have the child, remain with defendant and his wife, who are as near of kin as Rives. That before the death of the child's father, plaintiff desired him to allow the child to live with him, and the father refused, and preferred the child to remain with defendant; that defendant is worth \$30,000, and the child would get more from him than he would from the child, provided he should inherit from the child.

Denies plaintiff's not having notice of his intention in getting the judgment, and that the judgment is right, &c., and the letters of guardianship are void because the Court granting them in Randolph had no jurisdiction, the child living in Lee, and had no property in Randolph, and that the estate of Massey, deceased, in Rives' hands was fully administered, and that Jesse Cock was the testamentary or appointed guardian of said child, and acted as such a long time, providing for him until defendant provided for him; admits the child will get from his father's estate 6 or \$8000; that said Rives has three children, defendant has none, and he and his wife are much attached to the child; Rives is insolvent, and his property is beyond the reach of his creditors.

It was agreed that the Court should decide the application without a jury.

Jesse Cock testified that Sneed was a fit and proper person

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to take charge of the child; he was worth from 15 to \$20,000 over and above his debts, and he, as the uncle of the child, was willing for him and his wife to take the minor. They had no children. Sneed was about or over fifty years of age, and his wife about forty-nine. The child's mother died when he was an infant, and Mrs. Rives nursed him. Mrs. Rives was kind and affectionate to him, but thought more of her own children. While Rives' family was sick, Mrs. Sneed took the child home, and it remained there until last August, when Mrs. Rives again took it home from Smithville. Massey died at witness' house in Lee county; deceased's plantation was in Dougherty, and he claimed his home there. Witness is trustee under the marriage contract between Mr. and Mrs. Massey, and holds the property in trust for the two children. Witness heard Massey, a day or two before he died, say he wished Mr. and Mrs. Rives to raise his children. Said it was the wish of his wife before her death, and he had no reason to change it. That Mrs. Rives was willing for Mr. Sneed to take John, but that he did not wish him to raise him; had no objection to Mr. Sneed having the child until he was old enough to go to school, but then he must go to Mrs. Rives and go to school, and both be raised together. Regards Rives insolvent; that is, money could not be forced from him by law. Rives is a religious man. The children's property in hand is worth 7 or \$8000, and altogether they are worth from 18 to \$20,000.

The marriage contract between Mr. and Mrs. Massey was introduced, by which all Mrs. Massey's property before marriage was vested in Jesse Cock, as trustee for her and her children, free from the debts, &c., of her husband, to be held by said trustee during coverture.

Thomas Hughes testified that he had known Dudley Sneed and his wife a long time; had seen the child at their house. They manifested as much affection for it as if it had been their own, and corroborated what Jesse Cock testified about

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the wishes of Mr. Massey, expressed about the child a day or two before his death.

It was admitted that Franklin Cock, J. T. Cock, and Jesse Cock, brothers of Mrs. Massey and uncle of the child, knew of the intention of Sneed, and were willing he should adopt the child.

Robert Rives then introduced letters of administration granted to him in Dougherty county in 1854 on the estate of Needham Massey, and letters of guardianship of John N. Massey and Sarah Massey, orphans of said Needham, from Randolph county, dated 3d October, 1855.

Rives moved to Randolph county in the winter of 1854-5; at the time of granting letters of guardianship, lived in Randolph at Rives', and that John N. was at Sneed's in Lee, and had been nearly ever since his father's death.

Drury Massey testified he was the only brother of Needham Massey, deceased; his father's name is Needham; still living, and is a man of considerable property; and should he die without a will, these children will inherit from him a sufficiency to support, educate, and set them out well in the world. This child is named for both grandfathers, and Needham Massey Senior, is deeply mortified and bitterly opposed to his being adopted by Dudley Sneed, and to his name being changed. He corroborated the other witnesses about Mr. Massey's expressions concerning his children, just before he died—Rives was present. His brother was speaking of and contemplating the prospect of death. He then said he wanted his children raised properly; and to Mr. Rives he said: "I want you to bring them up in the nurture and admonition of the Lord; give them a good substantial education; I had rather have them raised with a good substantial education, and start in the world without a cent, than raised by Sneed and inherit his whole fortune." That Mrs. Rives was anxious to let Sneed have John, but he did not desire it. He might stay there until he got large enough to go to school, but then he must go home and go to school

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with his sister; and if Rives was not able to raise them, witness must take them. Witness desired Rives to raise them in preference to Sneed, on account of his brothers' wish. Needham Massey said his wife was very anxious for Mrs. Rives to raise her children, and he had no desire to alter it.

After argument, the Court refused to vacate the judgment and plaintiff excepted.

The plaintiff then moved to have the grandfather of said child, Needham Massey Senior, appointed guardian *ad litem* of said minor for the purpose of having the rights of said minor, growing out of this transaction, properly represented.

Which the Court refused to do, and plaintiff excepted and assigns error.

VASON & DAVIS; WARREN & WARREN, for plaintiff in error.

WEST; KIMBROUGH; MCCOY & HAWKINS, for defendant in error.

So nearly allied to the foregoing case is the following, that they are reported and decided together.

DUDLEY SNEED, plaintiff in error, vs. ROBERT RIVES, guardian, &c., defendant in error.

Habeas corpus, from Randolph, before Judge KIDDOO.

Dudley Sneed sued out a *habeas corpus* to obtain the possession of John N. Massey Sneed, the minor who is the subject of the foregoing case, and introduced in evidence an exemplification of the record of the Superior Court of Lee county of the judgment obtained by him in said Court, and which has already been recited, and closed his case.

Defendant introduced the affidavit of Needham Massey and J. W. Massey, and a certified copy of a *rule nisi* granted at Lee Superior Court, which has been already recited. Rives' an-

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swer in the matter was also read, which sets out substantially the facts as stated in the testimony of the witnesses in the preceding case, and that at the time he took the child from Sneed, it was time for him to be put to school, and that Sneed surrendered it quietly. He always considered his home the child's home after the earnest and solemn request of the children's parents that they should raise them. The child went to Sneed's because his wife was in feeble health, and had her own sick children to attend to, and because he, the said minor, was then weaned.

Defendant closed, and plaintiff, in rebuttal, read the affidavits of Jesse and Isaac T. Cock, which are in substance the same as their testimony before reported. They are the brothers of the whole blood of Mrs. Massey, the mother of the child, and of Mrs. Robert Rives, and of the half blood of Mr. Dudley Sneed.

Defendant also introduced letters of guardianship of said minor, dated 3d October, 1855.

To which plaintiff objected on the ground that they were void.

The Court overruled the objection, and plaintiff excepted.

The Court awarded the custody of the child to the defendant, and plaintiff excepted, and on these exceptions assigns error.

WEST; KIMBROUGH; MCCOY & HAWKINS, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant in error.

By the Court.—MCDONALD, J. delivering the opinion.

The Constitution of this State has been amended by adding a section to the first Article, declaring that the Legislature shall have no power to change names, nor to legitimate persons, &c., but shall, by law, prescribe the manner in which such power shall be exercised by the Superior and Inferior Courts, and the privileges to be enjoyed. *Acts of 1855*

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and 1856, page 106. The Legislature, at the same session, passed a statute prescribing the manner in which the Courts should exercise the power. Page 260. Under this Act, Dudley Sneed applied to the Superior Court of Lee county, making known his desire to adopt John Needham Massey, an infant son of Needham Massey, deceased, and to change his name to John Needham Sneed.

The child's mother was dead. The child having neither father nor mother, no notice of the application was given to any one. The Court passed an order to the effect prayed for, and further establishing the relation of parent and child between the said Dudley Sneed and the said John Needham Massey, by the name of John Needham Sneed, the same as if he had been the natural legitimate child of the said Dudley Sneed.

[1.] The first of the above cases is an application to the Court to rescind the above order. The Court below refused to rescind it, and on that refusal, the case is brought to this Court.

The majority of this Court are of opinion that the Superior Court had the power, under the Constitution and law, to pass the original order, and that it was passed in conformity with both. If the same Court has the power to rescind the order when passed, it is a matter entirely within its discretion, and this Court will not attempt to control that discretion, and therefore it affirms the judgment of the Court below.

[2.] I am of opinion that this Court has no jurisdiction of the cause. Conceding the power of the Court below was unquestionable, there was no error in law or equity for this Court to correct, and under the Constitution this Court has no jurisdiction beyond that. The section added to the Constitution prohibits the Legislature from enacting certain laws, or laws on certain subjects, but does not give authority to the Courts to exercise any power over the same subjects, but declares that the Legislature shall prescribe the manner in

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which the power to do these things shall be exercised by the Courts. I will not stop to enquire whether this kind of implied power can repeal an express prohibition in the Constitution, to the Courts to exercise Legislative power. If the Courts have power under the Constitution and the law, it is only a branch of Legislative power transferred from the General Assembly to the Courts. If a question should arise in respect to the right of the child to inherit Sneed's estate under the order, a question may be made, whether it be legal or constitutional, in the same manner as a question might be raised as to the constitutionality of a statute passed for the same purpose.

As the opinion which I entertain would leave the action of the Superior Court without affirmance or reversal here, it would stand, as a matter of Course, for whatever it may be worth. The opinion of the majority of the Court must be certified to the Court below, which is a judgment of affirmance.

Judgment affirmed.

[3.] The other case was brought to this Court on the judgment of the Court below on a writ of *habeas corpus*, sued out by Dudley Sneed against Robert Rives, for the purpose of obtaining the custody of the same child, then in possession of the said Rives. Sneed claimed the child under the order of the Court making him the adopted child of the said Sneed. Rives claimed to be his legal guardian under the appointment of the Ordinary of Randolph county, and as such entitled to his custody. His return to the writ, set forth that appointment as his warrant for holding the child. It was insisted, on the other side, that the letters of guardianship were invalid for the want of jurisdiction in the ordinary who made the appointment. At the time of the appointment, the child had been for several years and then was, residing in the county of Lee, but jurisdiction was claimed for the ordinary of Randolph county on the ground that it was the request of the deceased father of the child, that at a par-

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ticular age, which he had attained, he should go to and live with Robert Rives and his wife. The Court remanded the child to the custody of Rives, and that is the decision which is excepted to.

The residence of the child, however occasioned, was, at the time of the appointment of the guardian, in the county of Lee; and the Ordinary of Randolph had no jurisdiction of the case. *Cobb's Digest*, 286. The letters of guardianship, therefore, conferred no authority on Rives. A majority of this Court is of opinion that Dudley Sneed, in consequence of his established relation of parent to the child, had a right to the custody of his person; even if the letters of guardianship had been good and valid. It is the opinion of this Court that the presiding Judge in the Court below ought to have ordered the child into the custody of Dudley Sneed.

Judgment reversed.

WM. BRYAN, ex'or., &c., plaintiff in error, vs. JAMES A. ROOKS, adm'r., &c., defendant in error.

A wife being entitled to a legacy, dies before the husband reduces it to possession, and the husband who survives his wife twelve months, dies without administering on her estate. A stranger administers on the wife's estate.

~~Held~~, that the wife's estate vested in her husband, and that when her administrator receives it, he shall hold it in trust for the next of kin of the husband or his legatees.

In Equity, from Twiggs county. Tried before Judge LAMAR, March Term, 1858.

This bill was filed by James A. Rooks, administrator of Tabitha Adams, deceased, wife of Obadiah Adams, against William Bryan, executor of Daniel Massey, deceased.

The following are the facts as agreed upon by counsel:

Daniel Massey, Bryan's testator, died in 1847, leaving by

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will to complainant's (Rooks') intestate, daughter of said Massey, who died about two months after her father, two negroes, Joe and Ned, together with an undivided interest in remainder in an estate left her mother, the widow of said Massey; that her husband, Obadiah Adams, died about twelve months after the death of his wife, without reducing the subject matter of this suit into possession, or administering upon her estate.

The bill filed by Rooks, as admitted, set forth the foregoing facts and prayed for an account and recovery of the legacy—the two negroes, Ned and Joe. These allegations were admitted by the answer, and in addition thereto, Bryan stated, that as there were no debts against plaintiff's intestate, there was no necessity for an administration upon her estate; that she had left no child or children, and that the object of the administration was to have the property inure to the benefit of (as he had been informed) a son legitimated by and made the heir of Adams; that he sold the negroes after Adam's death, and distributed the proceeds of the sale between Mrs. Adams' two sisters, one of whom was his, Bryan's, wife; that when a witness on the stand, he did not state that the distribution was made with the knowledge or assent of Adams, or whether before or after his death; that the sale was in 1848 on twelve months time.

The complainant proved by William Bryan the worth of Joe and Ned, their annual hire.

Defendant, the evidence being closed, moved to dismiss the bill because, under the case and facts made and agreed upon, no one had a right to administer upon the estate of Tabitha Adams and bring this suit, except Obadiah Adams, her husband; and he, having died without reducing his wife's choses in action into possession, or administering upon her estate, that no one else can do so, especially unless she left creditors.

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The Court overruled the motion, and the jury found for complainant. Whereupon defendant excepted, and assigns error.

W. S. ROCKWELL, for plaintiff in error.

SAMUEL HALL, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

We affirm the judgment of the Court below. The legacy, under her father's will, had vested in Mrs. Adams before her death. Her husband having survived her, was entitled to administration on her estate, real and personal, and on her rights and credits; and as such administrator, might have recovered and enjoyed them, and they would not have been subject to distribution. *Cobb*, 294. But the husband having neither reduced his wife's property to possession during her life, nor administered on her estate after her death, it is now insisted that her estate goes to her next of kin, and that complainant, as her administrator, cannot recover; that the estate has already been distributed according to law. The statute declares that the husband shall hold it, and that it shall not be subject to distribution. It is not, therefore, distributable amongst the wife's next of kin. It must vest in the husband, and why are not his representatives entitled to it? *Squib vs. Wyn*, 1 *Peere Williams*, 378; *Carl vs. Rees*, cited in this case; *Elliot vs. Collier*, 3 *Atkyns*, 526; *Stewart vs. Stewart*, 7th *John. Ch. Rep.*, 229. The right of administration following the right of estate, the husband's next of kin are entitled to the administration. But if any one else administer, even if it be the next of kin of the wife, he shall hold it in trust for the next of kin of the husband or his legatees.

Judgment affirmed.

Russell. vs. Arnold

JACOB RUSSELL, plaintiff in error, vs. JOHN F. ARNOLD, defendant in error.

The Act of 1845, exempting the daily, weekly, or monthly wages, of journeymen mechanics and day laborers, from garnishment, is not repealed by the repealing section of the general attachment Act of 1856.

Certiorari, from Bibb county. Tried before Judge LAMAR, May Term, 1858.

John F. Arnold sued Jacob Russell in a Justices Court, and garnisheed the South Western Railroad, and on the return of the answer to the garnishment, plaintiff moved to enter up judgment against the garnishee; to which the defendant objected on the ground, that the monthly wages of laborers and mechanics are exempt from the laws of garnishment. The answer of the garnishee was, that they were indebted to Russell \$33, for one month's wages as a fireman for one of their engines, he having been employed by them as such fireman at \$33 per month, payable monthly; which objection the Justice overruled, and defendant *certiorated* the case to the Superior Court; said Court sustained the decision of the Justices Court and defendant excepted.

LANIER & ANDERSON, for plaintiff in error.

W. T. MASSEY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

In 1845, the General Assembly passed an act in the following words: "That from and after the passage of this act, all journeymen mechanics and day laborers shall be exempt from the process and liabilities of garnishment, on their daily, weekly, or monthly wages, whether in the hands of employees or others." *Cobb Dig.* 88.

On the 4th of March, 1856, the General Assembly passed

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a general act relating to attachments and garnishments, of which act, the 55th section is in the following words:

"That all Acts and parts of Acts upon the subject of attachments and garnishments, be and the same are, hereby, repealed." *Acts of 1855-56*, 38.

In the present case, the Court below held, that this section repealed the former Act. Was that decision right?

We think not.

On the 5th of March 1856, the next day after the date of the Act containing the repealing section aforesaid, the General Assembly passed an Act of which, the first section is in the following words:

"That in all cases hereafter, where any *fi. fa.*, or attachment shall be issued from any of the Courts of this State, the defendant or defendants in said *fi. fa.*, shall be authorized to present to the levying officer, a schedule of such property as may be exempt from levy and sale, and upon failure of the defendant to do so, then the wife of defendant, or any of the children, or any one who shall appear as the next friend of said wife, or child, or children, shall be authorized to do so, *provided*, that said next friend shall give notice, under oath, that the same is done in good faith; and when this shall be done, if the levying officer shall levy and sell said property, he shall be liable to be sued for trespass." *Id.* 232.

This is an Act in aid of the exemption Acts; the passage of it shows, therefore, that the legislature must have considered those Acts as still in force, notwithstanding the passage of the said repealing law on the day previous. The passage of the Act may, therefore, be taken as showing, that the words "Acts and parts of Acts upon the subject of attachments and garnishments," contained in the repealing law of the day previous, were intended by the Legislature, not to include the Acts exempting certain property of certain classes of persons from their debts, (which is exempting it from *all* legal process whether by attachment, garnishment, or *fi. fa.*) The two laws were passed by the same legislature, and with the in-

terval of but a single day, between the passage of the one, and the passage of the other.

Courts must construe the words of a law, in the sense in which the words are used by the Legislature, even should such a construction do violence to the words.

But would construing these repealing words, as, not extending to the exempting laws, be, of necessity, doing violence to the words? In short, is the "subject" of the said Act of 1845, (one of the exempting laws,) "garnishments;" or is it not rather *exemption*? The object of the Legislature in passing that Act, was to *exempt* "wages," in the cases to which the Act refers, from the *debts* of the laborer or mechanic; the means taken, was merely to relieve the wages from liability to garnishment—they as a debt, not being liable to be reached by any other process. And, certainly, what the legislator, in making a law has for his end, may, with as much propriety, as what he takes for his means, if not with more, be called the "subject" of that law.

There is then as much reason to say, that, exemption from debt was the "subject" of the Act of 1845, as there is to say, that garnishment was the subject of the Act; is there not more?

Holding, therefore, that words which say, they repeal all Acts on the "subject" of garnishment, do not repeal this Act of 1845, is not by any means, of necessity, doing violence to the words. As well might we say, that holding that the words do, repeal that Act is, of necessity, doing violence to the words! In effect, the Act is one which makes the wages to which it refers, exempt from *debt*, not merely from *one mode of* collecting a debt.

We think, then, that the Court below erred in holding that the Act was repealed, by the repealing section of the general attachment Act of 1856.

Judgment reversed.

Christian vs. Mansfield.

JOHN M. CHRISTIAN, plaintiff in error, vs. LUCIUS MANSFIELD,
defendant in error.

When the party resides out of the county, the attorney may make the showing for a continuance, provided for by the 35th rule of Court. The case is the same, when the party liable over to the party, resides out of the county, if it is he that defends the suit.

Complaint, from Stewart county. Tried before Judge
KIDDOO, April Term, 1858.

This was a suit against John M. Christian on a note, signed by James C. Christian as principal, and Thomas Stovall and John M. Christian, securities.

When the case was called for trial, defendant by his counsel moved for a continuance, stating together with other matters, that they were employed by James C. Christian, who was a resident of Randolph county, and who was the principal in said note sued on; that the defendant, John M. Christian, who was absent, was only security, and a resident of Stewart county.

The Court refused the motion, and the case was tried and verdict rendered for the plaintiff, whereupon defendants counsel excepted and assign error.

TUCKER & BEALL, for plaintiff in error.

J. L. WIMBERLY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

According to the exposition which the 35th rule of Court has received in practice, the attorney may make the showing for a continuance, when the party resides out of the county. And so is the common law. *Tidd Prac.* 722, *H. Black.* 637.

In the present case, James C. Christian was the principal in the note, and, though not himself sued, was defending the suit, which was against John M. Christian, a surety. Tuck-

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er & Beall were the attorneys of James C., as the principal. He then was a *privy* to the suit, and as such, would have been bound by the judgment, as between himself and John M. Christian.

This made him occupy such a relation to the suit, we think, as to give him, with respect to continuances, the rights which he would have had, if he had been a party to the suit.

He resided out of the county.

We think, therefore, that the case was one in which the attorneys might make the showing for a continuance. And therefore, we think, that the judgment of the Court below was erroneous.

Judgment reversed and new trial ordered.

FRANCES HOLLIDAY, plaintiff in error, vs. JEREMIAH RIODAN,
defendant in error.

To entitle a party to the process authorized by the act of 1830, to authorize the issuing of writs of *ne exeat* &c., the affidavit of the party applying, required by the statute, must be positive.

Equity, from Worth county. Decision on demurrer by Judge LAMAR, April Term 1858.

Jeremiah D. Riordan filed his bill against Frances Holliday in which he alleged that he was the guardian of his daughter Frances, legitimate child of his marriage with Jarra Lane, a widow, daughter of John Smith, deceased. John Smith died leaving children by his first wife, to-wit: Frances Holliday, Elizabeth Russell and Jarra Lane, and also leaving a will which was proven and admitted to record.

Holliday vs. Riordan.

The bill further sets forth certain equitable claims of Riordan, as guardian, in right of his daughter Frances, to the property left by the will of Smith; that the balance of the property, (stating the amount) in the possession of defendant, is now in Worth county; that he apprehends said property will be removed beyond the limits of the State, and his rights as guardian, and the rights of his ward, will be impaired unless a remedy be given him against their removal, and prays for a writ of *quia timet* against Frances Holliday.

Which bill was demurred to for want of equity and jurisdiction; and because the bill does not allege the negroes were in Worth county, at the time of the filing of the bill, or are now, and that the oath verifying, the bill was not sufficient, because complainant failed to give bond, &c.

Complainant swore to the facts in the bill, *to the best of his knowledge and belief*. And after the decision of the Court sustaining said demurrer, complainant moved to amend his bill by alleging the residence of defendant to be in the county of Worth, and that the negroes were there at the time of filing said bill, which the Court permitted and defendant's counsel excepted and assigned error.

STROZIER & SMITH, for plaintiff in error.

CLARKE & LIPPETT, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The Judgment of the Court below must be reversed, on the ground that the affidavit is not sufficient in law, to entitle the complainant to the strong remedy he prays for. The bill alleges that the complainant entertains serious apprehensions that the property will be removed beyond the limits of the State, and that his rights as guardian and the rights of his ward, will be impaired unless a remedy be afforded for the preservation thereof. He deposes that the facts contained in the bill are true *to the best of his knowledge and belief*.

The affidavit required by the statute, *Cobb* 527, is positive. An affidavit to the best of the knowledge and belief of the complainant is not the affidavit required by the act. Of some of the facts necessary to be positively sworn to, he may have no knowledge, and may have no reasons for believing them true.

The bill was amended in the Court below so as to remedy objections respecting the jurisdiction of the Court and the *locus* of the property.

The facts alleged in the bill are sufficient to entitle the complainant to the remedy he asks, if the affidavit were sufficient; but that being insufficient, we reverse the judgment of the Court below, with instructions, however, to allow the complainant, if he desires it, to make an affidavit in conformity with the statute, and thereupon to grant to complainant the relief to which he may be entitled under the act.

Judgment reversed.

NEIL MCCOLGAN, plaintiff in error, vs. NEIL MCKAY, defendant in error.

It is almost a matter of course, to let in new evidence on a point, to save a nonsuit.

Assumpsit, from Sumter county. Tried before Judge ALLEN, March Term, 1858.

Plaintiff, McColgan, sued defendant McKay on the following bill of particulars.

Neil McKay to Neil McColgan,	Dr.
To balance on settlement of partnership between you and me	
found, and acknowledge due me,	\$520.00.

McColgan vs. McKay.

On the trial plaintiff offered in evidence an account, stating items particularly, signed by the defendant. The part of this bill of exceptions giving a copy of this account is written so badly as not to be readable. Defendant's counsel objected to the account upon the ground that there was no sufficient evidence to authorize the plaintiff to recover; upon which motion the Court remarked that he would allow it to go to the jury, to which the plaintiff excepted.

Plaintiff closed his case and defendant moved for a nonsuit, which the Court granted. The plaintiff moved to be allowed to open his case and prove that the paper which was admitted to be signed by defendant was given in 1853, after a full and final settlement of the partnership, set out in the declaration, and was an acknowledgment of an indebtedness of \$520, from the defendant to the plaintiff, which the Court refused, holding that when the plaintiff closed his case, he closed taking all the responsibility of what the Court would decide, and the case could not be opened, especially when the plaintiff had notice of the previous rulings of the Court in the case; whereupon plaintiff excepted, and assigns the same as error.

HAWKINS, for plaintiff in error.

McCAY, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

We think, that the motion of McColgan, the plaintiff, for leave "to open his case, and prove that the paper" "was an acknowledgment of an indebtedness for the amount of five hundred and twenty dollars," should have been granted; especially, as McColgan resisted the nonsuit, insisting that Courts have no power to grant a nonsuit against the consent of the plaintiff, and it is, at least, a very doubtful question whether he was not right in this position. See 1. *Pet. R* 469.

It is almost a matter of course, to let in evidence upon a point, to save a non-suit. The practice is commended by every consideration of expediency.

We think, then, that the Court below erred in refusing this motion.

Judgment reversed and case reinstated.

THOMAS D. COTTLE, plaintiff in error, vs. JOEL DODSON, defendant in error.

A claim of slave levied on to satisfy an execution issued from a Justices Court, must be returned to the Superior or Inferior Court whichever may be first held.

Claim, from Marion county. Tried before Judge WORRILL, March Term, 1858.

When said cause came to be tried, it was moved to dismiss the claim, on the ground that the same was interposed on a Justice Court *fi. fa.*, to a levy on a negro slave made before the November Term of the Inferior Court, and should have been returned to said Court. Whereas it was returned to the March Term of the Superior Court. Whereupon the Court refused to entertain jurisdiction and dismissed the case.

This motion was on the part of claimant, and the plaintiff in *fi. fa.* excepted and assigns error.

DAVIS & HUDSON, for plaintiff in error.

ELAM & OLIVER, for defendants in error.

Brooks vs. Colby, adm'r &c.

By the Court.—McDONALD, J. delivering the opinion.

The statute requires that claims of slaves, levied on by virtue of a writ of *fi. fa.* issued from a Justices Court, shall be returned to the next Term of the Superior or Inferior Court, which ever may first happen, there to be tried. The law regulating thus, the time and place of trial, the parties are bound to take notice of it, and we must presume that the parties will respectively prepare for trial in the proper form. If the Sheriff fail to make a return as the law directs, the plaintiff in execution or claimant, may move a rule against him for the return of the claim.

The Court below ought to have stricken the case from his docket. It had no more authority to *dismiss* the *claim* than to try it, and I suppose all it did was to strike it.

Judgment affirmed

SAMUEL W. BROOKS, plaintiff in error, vs. FRANCIS S. COLBY,
adm'r, &c., defendant in error.

No error for the Court to allow a complainant to rescind an order, to amend the bill, passed on his own application and for his own benefit, the bill having not been amended.

In Equity, from Randolph county. Decision by Judge KIDDOO, November, adjourned Term, 1857.

A bill filed by the administrator of J. M. Colby against

Brooks, as the surviving partner of J. M. Colby & Co., for account and settlement.

On the trial, while the complainant's attorney was reading the bill to the jury, the defendant's attorney called his attention to an order, passed, October Term, 1855, on motion of complainant's counsel, striking out that part of said bill, relative to two specified notes. Complainant's attorney moved to rescind the order, and the defendant's attorney objected; Court allowed the motion, the order was drawn and put upon the minutes, reciting, moreover, that the bill had not really been amended under the first order; defendant excepted and assigns error.

W. C. PERKINS, for plaintiff in error.

TUCKER & BEALL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The order to amend the bill which was put on the minutes, and which it was now proposed to rescind, was moved by complainant, and can be considered nothing more than leave to amend. After obtaining the order the complainant did not amend, and the bill of complaint remained as it was.

The order to amend was no amendment, when moved by the party, at whose instance it was granted, for his own benefit, it was not compulsory. The bill was, in fact, not amended. A bill is amended by either striking out or inserting matter, or engrossing the bill anew, adding the new matter, and so marking it as to distinguish it from the original matter. This is the mode of amendment in England. We follow it, except that we seldom engross the bill anew. There was no error allowing the order to amend to be rescinded, although that was not necessary to entitle the complainant to rely on the bill as it stood unamended.

Judgment affirmed.

Shelton et al. vs. Wright, adm'r.

JOSEPH T. SHELTON, et al., plaintiffs in error, vs. JOHN B. WRIGHT, administrator of MARY M. SHELTON, deceased, defendant in error.

An illegitimate child fully legitimated by an Act of the Legislature, passed by the procurement of the putative father, becomes his lawful child, and such child and his lawful children, upon the death of either, intestate, inherit from each other.

Equity, from Taylor. Decision on demurrer to bill, and demurrer to plea to bill, by Judge LAMAR, April Term, 1858.

This bill was filed by the children and heirs at law of David Shelton, deceased, against John B. Wright, administrator of Mary Martha Shelton, deceased.

The bill alleges that David Shelton, was the father of a girl child called Mary Martha Nix; that said child was born out of lawful wedlock; that she was recognized and claimed by said David as his child, and that in 1854, he procured an Act of the Legislature to be passed, changing her name from Nix to that of Shelton, and fully legitimating her, and making her one of his heirs at law. That said David, in life, made a will by which, among other things, he bequeathed to said Mary Martha three thousand dollars; and afterwards said David departed this life, and said will was proven and recorded, and letters testamentary granted to E. H. Worrill. That afterwards the said Mary Martha died intestate, leaving next of kin, the complainants; that after her death, letters of administration were granted to Robert H. Dixon and John B. Wright, on her estate; that R. H. Dixon has since died, and that since his death the executor, Worrill, has paid over to the surviving administrator, the three thousand dollars by said will bequeathed to said Mary M., and that said sum is in the hands of said administrator, to be divided between her next of kin; that said Mary M. dying at the age of six years, owing no debts, the administrator has waived his right of delaying this suit twelve months after letters of administration granted him; and that they have requested said

administrator to distribute and pay to them the said sum of three thousand dollars, and that he has refused so to do. The prayer of the bill is, to compel the administrator to pay to and account to them for this said sum.

The defendant plead to the bill, that complainants had no interest in the subject matter of the suit, for that they, nor, either of them, are the heirs at law of said Mary Martha; that said Mary Martha was the illegitimate daughter of one Nancy Nix, who is still living, and that said Mary Martha, at the time of her death, had living a brother and sister, also illegitimate children of said Nancy Nix, and older than said Mary Martha, who are now living; that said Mary Martha was aged six years, and that after her birth, said David Shelton had a lawful wife then living, and had such wife many years before that time, and that complainants are the issue of said legal marriage, and that said Shelton and said Nancy Nix were never married; that said Shelton left a valid will, disposing of his whole estate; that said Act of 1854, legitimating said Mary Martha, and changing her name, was not procured or assented to by said Mary Martha, or by her said mother, brother or sister, or either of them, and if valid, which is denied, does not determine or prescribe who shall be the heirs at law of said Mary Martha, but left the law in relation thereto, as it heretofore stood.

Defendant also demurred to the bill because,

1st. The complainants had no interest whatsoever in the suit.

2d. Because said Act of 1854 does not constitute complainants, or either of them, the heirs at law of said Mary Martha Shelton.

3d. Because there is no equity in complainants' bill; and moved the same be dismissed.

Complainants demurred to the plea of defendant; and by agreement, the demurrer to the bill, and the demurrer to the

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plea, were consolidated, to be heard and decided together and after argument, the Court decided, ordered and decreed, that the demurrer to the bill be sustained and the bill dismissed, and further, that the demurrer to the plea be overruled; to which decisions, orders and decrees, complainants excepted, and on the same have assigned error.

SMITH & POW, for plaintiffs in error.

A. F. OWEN; STUBBS & HILL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The complainants in the bill are legitimate children of David Shelton, late of Talbot county, deceased. They claim to be heirs at law of Mary Martha Shelton, a daughter of the said David Shelton, born out of lawful wedlock, but fully legitimated and made the heir at law of the said David Shelton, and made capable of inheriting his property as though she had been born in lawful wedlock. Shelton, by his last will and testament, gave her a legacy of three thousand dollars. She survived him but a short time, and the complainants are claiming of her administrator, that legacy, as her heirs at law. The defendant demurs to the bill, on the grounds, viz:

1st. That complainants show that they have no interest whatever in the subject matter of the suit.

2d. That the Act of 24th February, 1854, (the legitimating Act,) does not constitute the complainants, or either of them, heirs at law of the intestate.

3d. Because there is no equity in the complainants' bill.

The defendant pleaded also to the bill, that the complainants are not the heirs at law of the intestate; but that, prior to the Act of legitimation of the said Mary Martha, she was the illegitimate daughter of Nancy Nix, and that, at the time of her death, she left a brother and sister, illegitimate children of the said Nancy Nix; that the said Shelton, at and af-

ter the birth of the said Mary Martha, had a lawful wife then living, and had such wife many years before that time, and that complainants are the issue of that lawful marriage; that the legitimating Act was not procured or assented to by the said Mary Martha, her mother, or her brothers, and that the said Act, if valid, does not define, prescribe or determine who shall be the heirs at law of the said Mary Martha, but left the law in relation thereto, as it theretefore stood.

The complainants demurred to the defendant's plea, and the Court heard argument of both demurrers at the same time, and overruled the demurrer to the plea, but sustained the demurrer to the bill and dismissed the bill; and complainants except.

The bill charges, that the Act of legitimation was procured to be passed by David Shelton.

The rights of the complainants depend upon the construction of the Act of legitimation; and such Acts, I admit, must be construed strictly. If Shelton had died intestate, what was to prevent this child from inheriting his estate, or a part of it, at least? The Act was procured to be passed by Shelton. The property was his, which it would have been entitled to inherit, if he had died intestate. There was no vested right to it in any one else, to make his or her consent necessary to the validity of the Act. The will was made before the Act, but the property did not vest in the legatee until the death of the testator, which was after the Act was passed. The Act therefore, interfered with no vested right of the child. The money alone is in contest here; that was bequeathed by Shelton. If the Act had not been passed, he might have changed the phraseology of the will in regard to the money, and might have given it to his own children, as he did the negroes, in the event of the death of his child without children. He might have allowed it to stand to aid it in marriage. We cannot tell. So far as the act of legitimation affected rights of property coming from him, whether by descent or purchase, his consent was all that was necessary to give it validity. He had a

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right to prescribe the condition on which any portion of *his* property should pass to it, whether it passed by his will, or by legislative Act, passed by his procurement. If the child were *fully* legitimated as his child, she became his legitimate child for all purposes, and the words added, which made her capable in law of inheriting his property, as if she had been born in lawful wedlock, gave strength and force to the enactment, and was not intended to, and did not limit, the effect of the previous comprehensive language. The child, then, was fully legitimated as the child of David Shelton. If she were his lawful child, she could not have been restricted in the enjoyment of all the rights and privileges *of his children*, born in lawful wedlock, and one of the rights and privileges *of lawful children* is, to inherit from each other. If one of the other children of Shelton had died intestate, and without issue, what was to hinder the legitimated daughter from coming in as a legal distributee in the estate? If she would have had a right to come in and share the *estates of others of his children*, who had died, now that she is dead, they come in and take her estate.

If the illegitimate had been entitled to an estate independent of that derived from Shelton, and one that he could not acquire without the consent of the child, and Shelton had an Act of legitimation passed, the effect of which would have been to take the property out of its legal course of inheritance, and to transfer it, on her death, to himself or his family, a question might arise, if that were not a case in which a Court of Chancery would relieve, against the effect of the Act. It would be one of the kind of private Acts, operating as a conveyance, against which a Court of Chancery in England would relieve. But that is not the question here. The child is fully legitimated as his child, is made his lawful child. It requires no liberal construction of the Act to determine this. It is the words of the Act. The Act of legitimation being an Act *fully* legitimating her, would operate on all the property, I apprehend, of the legitimated child, no matter

whence derived or how acquired. If not, there would be no necessity for the interposition of a Court of Chancery to relieve against its effect on any part of the child's property.

We think that, by the Act of legitimation, the daughter, Mary Martha, became fully legitimated as the lawful child of David Shelton, and that on its death the complainants became entitled to the property, under the statute of distributions.

Judgment reversed.

JACOB STRAUSS, plaintiff in error, vs. WALDO, BARRY & Co.,
defendants in error.

A. gives two promissory notes to B.; B. sues A. and C. as partners; C. pleads under oath that at the time said notes were given, he was not the partner of A.

Held, that this plea put upon B. the necessity of showing by proof that A. had authority to bind C.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, April Term, 1858.

Waldo, Barry & Co. brought suit on two notes against David Strauss and Jacob Strauss, which notes were signed by David Strauss only, and alleged that they were partners, doing business under the name and style of David Strauss.

Defendant, Jacob Strauss, pleaded *non est factum*, and that he was not a partner of the firm of D. Strauss, as alleged, at the time the notes were made.

On motion of plaintiffs' counsel, the Court ordered both pleas to be stricken, the first on the ground that defendant could not plead *non est factum* when he is charged as one

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of several copartners; secondly, that the plea in bar, as filed by defendant, was insufficient, in this, that it did not sufficiently deny the partnership as alleged in plaintiffs' declaration.

Defendant's counsel excepted to this ruling of the Court.

Defendant's second plea was in these words: "And for further plea, defendant says *actio non*, because he says, that at the time the said two notes, the foundation of plaintiffs' action, were made, he was not a partner of the firm of D. Strauss." Verified.

Upon the exception defendant's counsel assign error.

LAW & SIMS, for plaintiff in error.

R. F. LYON, for defendants in error.

By the Court.—LUMPKIN, J. delivering the opinion.

On two notes given by David Strauss alone, the payees sue, and seek to charge Jacob Strauss as a partner. Jacob Strauss put in the plea of *non est factum*. It was demurred to, and ordered to be stricken out by the Court, upon the authority of *Collier and others vs. Cross and another*, (20 Ga. Rep. 1,) and this case certainly sustains the Court in its decision.

I was not present when *Collier and Cross* was adjudicated. Of course, I shall bow to that decision, as to all others made by this Court, as law.

The defendant, Jacob Strauss, further pleaded, that at the time these notes were given by David Strauss, and upon which he is sought to be made liable, he was not a partner of the firm of David Strauss. And this plea is verified. This plea also was stricken out upon demurrer, as not being sufficiently full.

We differ from the Circuit Court upon this latter point. If Jacob Strauss was not a partner of David Strauss, at the time these notes were given, *prima facie* at least, David

Strauss had not power to bind him, by giving a partnership note. If there was any agency, or any other special reason, why Jacob Strauss ought to be bound, that could be proven under a replication to this plea. The plea, we think, was sufficient to put the plaintiffs upon proof of the partnership.

It is strongly laid down in *Story on Partnerships*, that even without this plea, where the partner, as in this case, does not sign & Co., he is deemed to have only contracted for his own private affairs, and does not bind his partners, unless the creditor shows by other proof, that the individual thus signing, contracted on account of the partnership affairs. *Story on Partnerships*, sec. 106 and note 2, and sec. 109 and note 2.

Perhaps the judiciary Act of 1799, requiring the defendant to deny the notes on oath, has made the plea put in, in this case, necessary. Still, it is undoubtedly full enough to require proof of the firm by the plaintiffs.

Judgment reversed.

D. A. JOHNSON & Co., plaintiffs in error, vs. **MECHANICS & SAVINGS BANK,** defendant in error.

Where A. obtains advances from a bank to buy cotton, and it is understood that payment is to be made by giving drafts on the cotton, on the factors to whom it was to be forwarded:

Held, that the factors having failed, a tender of drafts upon said house, is no discharge of the original liability.

Complaint and bail, in Muscogee Superior Court. Tried before Judge BULL, May Term, 1858.

Johnson & Co. vs. Mechanics & Savings Bank.

D. A. Johnson, of the firm of D. A. Johnson & Co., drew from the agency of the Mechanics and Savings Bank, at Columbus, at one time \$910 17, and at another time \$1,000. He had no funds in said agency; but the money was paid to him on the faith of a letter of credit from Hardwick & Cook, of Savannah, and the understanding that D. A. Johnson & Co. would give a draft on said Hardwick & Cook, for the whole amount. Before the draft was drawn, plaintiff and defendant had notice that said firm of Hardwick & Cook had failed, and were insolvent. Plaintiff then demanded of defendant the money advanced, or the cotton, which defendant refused, but offered to give the plaintiff a bill on Hardwick & Cook, with knowledge of their insolvency. At the time the money was advanced, defendants were to invest the same in cotton, and ship it to Hardwick & Cook, and draw a bill on them for the advance; and a few days after said D. A. Johnson received said money, and after notice of the failure and insolvency of said Hardwick & Cook, said D. A. Johnson & Co. tendered the plaintiffs a bill on Hardwick & Cook, for the amount so advanced to them.

It was agreed that the Court might decide, from these facts, whether plaintiff was entitled to recover of defendants; whereupon, the Court decided that the plaintiff was entitled to a recovery. To which decision defendant's counsel excepted, and now assigns the same as error.

WELLBORN, JOHNSON & SLOAN, for plaintiffs in error.

JONES & JONES, for defendant in error.

By the Court.—LUMPKIN, J. delivering the opinion.

The Johnsons came to Columbus, with a letter of credit from Hardwick & Cook, of Savannah, to the agency of the Savannah Savings Bank, at Columbus, to furnish funds to

enable the Johnsons to buy cotton. On the 15th and 16th of December, 1856, the Johnsons borrowed \$1,910 17, and it was understood that, according to their habit of doing business, they were to forward the cotton, which they bought with the money thus advanced, to Savannah, and draw on it at thirty days, to pay the bank.

On the 17th of the month, the day after the last cash was drawn, both the bank and the Johnsons had notice of the failure of Hardwick & Cook. The bank immediately called upon the Johnsons to refund the money just loaned, or to give the bank the control of the cotton. They refused to do either; but offered to give a draft on Hardwick & Cook, at thirty days, without showing, or even pretending, that the cotton purchased with the plaintiff's money, had been forwarded to Savannah. It does not appear that it ever was sent. The probability from the proof is, it never was.

The plaintiff sued forthwith, to recover the cash advanced to the Johnsons.

It cannot be seriously insisted, that the offer to give a draft upon an insolvent house, was payment of the defendants indebtedness. The bank never agreed to accept a draft as payment, or extinguishment of their demand. It was but a security, at best, for the original indebtedness. And they might decline taking it, if they considered it unavailable, which they did; and hold the parties bound upon their original liability.

And then the defendant not having shown that they had forwarded the cotton to Hardwick & Cook, what means were provided for the payment of the draft, which they offered to give?

Suppose certain bank bills had been mentioned as the currency, in which this loan might be paid, and the bank had failed, and the defendant had then offered to procure the bills and discharge the debt? This attempt is equally as reasonable. For in this case, he still retained the cotton, the only resource for raising the funds, and yet it is gravely proposed

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to settle with the creditor, who supplied the means to buy the cotton, by giving him a draft on an insolvent house!

Judgment affirmed.

JOHN IRWIN, plaintiff in error, vs. JAMES MCKEE, defendant
in error.

- [1.] Too late to object to process after party has appeared, confessed judgment, and entered an appeal.
- [2.] A Sheriff has no authority to collect money from a defendant who is sued, until he is commanded by an execution to levy it of his property.

Complaint and appeal, from Stewart county. Tried before Judge KIDDOO, April Term, 1858.

This was a suit on a note, and on the appeal the defendant moved to dismiss it, on the ground, that the process to the declaration was made returnable to the April Term, 1857, of the Superior Court, when it appeared that the said appeal was made from the October Term, 1856, of said Court.

The process to said declaration bore date April 1st, 1856, and required the defendant to appear at said Court, to be held on the third Monday in April next.

Which motion was refused by the Court, and to which defendant's counsel excepted.

The defendant pleaded that by his agent, John M. Scott, he made a tender to and offered to pay Russell, attorney for plaintiff, \$1,110 41 to be credited on the note sued on, 5th March, 1856, which Russell refused.

Plaintiff gave in evidence the note sued on for \$1060, due 1st March, 1855.

Defendant introduced Scott who testified he was Sheriff in 1855; that in October of that year, defendant paid him the principal and interest then due on the note sued on. Witness immediately wrote to plaintiff's attorneys, that he had collected said money, and it was subject to their orders. Heard nothing from them until March following, when they called upon him for the money, and he was willing to give them the money he had received, if they would give up the note, which was refused—they requiring interest on the amount from the time he received it until then. Witness refused to pay interest. He then proposed to pay over the amount in his hands, and let the parties contend for the interest, which was refused, and that he had paid the same over to Tucker & Beall, under orders from the defendant, and that the same was not deposited in Court as he knew.

The Court charged the jury, that Scott had no right as Sheriff to collect the money when he did, the case not having gone into judgment, that the plaintiff was entitled to interest up to date, and that the offer of Scott to Russell was not a tender.

To which charge defendant excepted, and on these exceptions assigns error.

TUCKER & BEALL, for plaintiff in error.

JOHN F. CLARKE, for defendant in error.

By the Court.—**MCDONALD, J.** delivering the opinion.

[1.] The process was amendable by law. The plaintiff in error employed counsel to defend the cause, who confessed judgment and entered an appeal, and on the appeal trial, he moved to dismiss the cause, on account of a defect in the process. The process was amendable by statute; but if it had not been, it had the effect of all process, for the defendant

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appeared and defended. It is not like the case of *Wheeler vs. The State*, 21 Ga. Rep. 153. That was the case of a contract and the Court only construed the contract. A contract is not amendable except by the parties themselves or with their consent.

[2.] The defendant paid the money due on the note to the Sheriff during the pendency of a previous suit instituted on the same note in the Inferior Court. The Sheriff has no authority to receive or collect money from the defendant, in virtue of his office of Sheriff, until he has in his hand an execution commanding him to levy it of the property of the defendant. A payment therefore, to him as Sheriff prior to his having this authority is no payment. He is not the agent of the plaintiff to collect it, and his having collected or received the money, and his notification thereof to the plaintiff, or his attorney, imposes no obligation on the plaintiff to incur the expense of sending for it, or to risk its transmission by mail. The plaintiff in error controlled the money, withdrew it from the hands of the Sheriff, and directed him to deliver it to his own attorneys. The charge of the Court to the jury was in accordance with our view of the law, and the judgment must be therefore affirmed.

Judgment affirmed.

THOMAS J. HAND and HAMLIN COOK, lessors, plaintiffs in error, vs. JOHN MCKINNEY, defendant in error.

A deed made in 1822, and recorded May 1836, will take precedence of a deed made and recorded December 1837.

A. sells and conveys a tract of land to B. in 1822. The grant does not issue till 1831. The deed is recorded May 1836. *Held*, That this deed will hold against a Sheriff's deed to the same property, made and recorded in Decem-

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ber, 1837. And that the purchase money having been paid by B, he has something more than a complete equitable title; and that under the statute of uses, he has a complete title, both for the purposes of prosecution and defence.

Ejectment, from Baker county. Tried before Judge ALLEN, May Term, 1858.

This was a suit in ejectment for lot of land No. 243, in the eighth district of Baker county, by John Doe, upon the demises of Thomas J. Hand and Hamlin Cook, against Richard Roe, casual ejector, and John McKinney, tenant in possession.

The case was tried, and the jury found for the plaintiff, and defendant by his counsel, moved the Court for a new trial upon the following grounds:

1st. That the jury found contrary to evidence.

2d. That the jury found contrary to law.

3d. That the jury found contrary to the charge of the Court.

4th. That the jury found contrary to evidence and the charge of the Court.

The Court granted the motion for a new trial and plaintiff excepted.

The facts of this case will be found sufficiently stated in the opinion pronounced by the Court.

VASON & DAVIS; SLAUGHTER & ELY, for plaintiffs in error.

WARREN & WARREN; LYON & IRWIN, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an action of ejectment to recover lot No. 243, in the eighth district of Baker county. On the trial, the title as disclosed by the evidence, stood thus: The land was

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deeded by Luke Johnson, the drawer, to Humphrey Rowell, the 9th day of September, 1822; the grant did not issue till the 17th day of October, 1831. The deed from Johnson to Rowell, was recorded May 28th, 1836; on the 5th December, 1837, this lot of land was sold by the Sheriff, as the property of Luke Johnson, and bought by James Chance, to whom a deed was made and recorded nine days thereafter, to-wit: on the 14th day of December, 1837. There is a regular chain of title from Chance to the defendant. Who is entitled to the land? There is no dispute as to the facts. The parties stand, each upon their legal rights. The jury found for the plaintiff, and the Court granted a new trial. Was the defendant entitled to a new trial?

The case does not fall strictly under the Act of 1837, except that under the first section of that Act, the deed from Johnson to Rowell was authorized to be read in evidence on the trial, upon the fact of registration, without further proof of execution. The Act of 1837, gives a priority to junior conveyances recorded within time, against an older deed unrecorded at the time the younger was executed, unless the second purchaser had notice. But the deed from Johnson to Rowell, as we have already seen, was recorded some eighteen months before the second deed was made. We repeat, therefore, that had these deeds been executed before the Act of 1837 was passed, the case would not fall within the letter of that Act. It has to be decided upon the law, as it stood prior to the enactment of 1837.

The Provincial Act of 1755, (*Cobb* 159,) did give a preference to younger deeds over older, where the former was recorded in time and the latter was not. But that was when deeds were recorded in the Register's office.

The Act of 1785, directing deeds to be recorded in the Clerk's office of the respective counties, is wholly silent upon this subject.

Our recollection of the decisions is, that notwithstanding the older deed was not recorded within twelve months, still

if recorded before the second deed was made, it was considered notice to the junior purchaser, and this would seem to be in conformity with the whole reason and spirit of our Registry Acts. Why should not notice by registration in such a case, be as efficacious as in any other? When does the purchaser search the records to ascertain the condition of land he is about to buy. Not at some remote point back, but he makes the examination at the time he is negotiating, and if the older deed be on record then, why should he not be chargeable with notice?

If A. sells and conveys land to B. and subsequently executes deeds to any number of persons, to the same land, still if B's deed is recorded within twelve months, he will hold under our Registry Acts, against all the rest, although his deed was unrecorded at the time they respectively bought. And yet, under this decision, no such fraud can be perpetrated. In other words, vendees under this decision are much better protected in the cases to which it applies, than they are under the law, as it now stands. The law needs amendment, both as it respects deeds and mortgages. *The first recorded should hold, irrespective of their dates.*

In this case, the deed from Johnson to Rowell, was recorded eighteen months before the Sheriff's sale. If registration ever is available as notice, it would seem, that it should be in this case.

And this construction is in accordance with the spirit of Act of 1837. (*Cobb* 175) This Act gives precedence to a junior deed, against an *unrecorded* older conveyance. The implication is irresistible, that if the older deed be recorded at the time the second deed is made, the second purchaser takes nothing. We held in the case of *May against Helms*, decided at this Term, as we had done already in previous cases, that ejectment might be maintained under a title, which amounts to a complete equity. In this case, when Rowell took a deed to the land and paid the purchase money, his equity was complete, and when the grant subse-

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quently issued, under the statute of uses, his title was something more than a mere equity. Indeed it should be deemed a legal title, both for the purposes of prosecution and defence.

It only remains to say, that our opinion is, that the Court erred in granting a new trial.

Judgment reversed.

B. O. KEATON, plaintiff in error, vs. **H. A. SCOTT**, defendant in error.

A father's will contained these words: "All the property hereby given to my daughters, is given to their sole and separate use, not subject to the debts or contracts of their husbands."

Held, That these words restricted the power of alienation in a daughter, so far as to prevent her from mortgaging the property, to secure a note of hers, given for a debt of her husband's.

Illegality, from Dougherty county. Tried before Judge **ALLEN**, May Term, 1858.

Henry A. Scott as trustee for Virginia A. Scott, and the said Virginia A. Scott, made a note for the sum of \$5,951 25-100, which was endorsed by said Henry A. Scott to Benj. O. Keaton, and the said Henry A. for himself and as trustee for Virginia A. Scott, and the said Virginia A. Scott, made and delivered to said Keaton a mortgage on eight negroes, to secure the payment of said note; these negroes had been given to the said Virginia, for her sole and separate use, by her father, then of the State of Alabama.

After maturity, Keaton foreclosed the mortgage, and levied on the negroes, and an affidavit of illegality was interposed.

On the trial, the foregoing facts appeared, and plaintiff closed his case.

Defendant then read to the jury the answers of Keaton to interrogatories, sued out in the cause, to which plaintiff objected, on the ground that Keaton was in Court and should be examined as other witnesses, *viva voce*. The Court overruled the objection and counsel for plaintiff excepted.

Defendant also, read in evidence two notes, signed John Scott, and endorsed Henry A. Scott, made payable to Henry A. Scott or bearer, one for \$1,000, and one for \$6,500 with the credits thereon, which when subtracted from the notes at the date of the mortgage, would make the amount of the note intended to be secured by it.

Defendant also, read in evidence the will of John Lester, the father of Virginia A. Scott, the thirteenth and part of the fourteenth items of which are as follows:

"I give and bequeath to my daughter Virginia Ann Lester, to her sole and separate use and benefit, a negro woman Charlott, about thirty-one years old, and her four children, Mary, Jim, Zue and Fort; also George, (called Mobby George,) about eighteen years old, Jack about twenty-one years old, Jane about fifteen years old, and the increase of said female slaves. It being the true intent and meaning of this my last will and testament that all property hereby given to my daughters, is given to their sole and separate use, not subject to the debts or contracts of their present or any future husband."

The negroes conveyed by mortgage were identified as being the same contained in the will.

Defendant closed.

Plaintiff in reply, offered in evidence a mortgage executed by Henry A. Scott to Keaton, with an assignment thereon by the plaintiff Keaton to Henry A. Scott, as trustee for his wife, Virginia A. Scott, and an entry of the money paid to the said trustee \$6,500; and a ratification and confirmation of the Act of the trustee by the said Virginia A. Scott; also, a receipt on the said mortgage to William Cheever, for his

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two notes of \$2,500 each, given for the purchase money, on lands mentioned in said mortgage, the notes to be applied to the mortgage and accounted for to the trust estate of Virginia Scott. \$3,600 of said notes was for the land mentioned in the mortgage, and \$1,360 for stock belonging to the trust estate of the said Virginia. This receipt was signed by Henry A. Scott as trustee.

Plaintiff also offered in evidence the petition of Virginia Scott, asking for a trustee to receive and protect the personal property and money coming to her from her father's estate, and the order of the Court appointing the said Henry A. Scott, as such trustee.

The counsel for defendant objected to said mortgage with the entries thereon, and the order of the Court appointing the trustee being read in evidence, on the ground that the will created a separate estate in Virginia Scott, "not subject to the debts or contracts of her husband," and that these words were a restraint upon alienation, and that she or the trustee or either of them, could not mortgage or encumber it for the husband's debts, with or without valuable consideration to the trust estate.

The Court sustained the objection and counsel for plaintiff excepted.

The case was submitted to the jury, and counsel for plaintiff requested the Court to charge the jury:

1st. That a married woman, so far as regards her rights to dispose of her separate estate, is a *feme sole*, except so far as she is restrained by the provisions of the instrument creating the separate estate. That the words "not subject to the debts or contracts of her present or any future husband," were not intended by the testator as a restraint upon the power of alienation in this case, but more fully to unfold the design of the testator to create a separate estate.

2d. That these words in the will of John Lester, do not

disable the wife by her trustee, and her own consent and ratification appearing, from charging her separate estate for the payment of a debt of her husband for a fair and full consideration.

3d. That it is not usury to purchase a promissory note founded upon a sufficient—valuable consideration between the parties, and not tainted with usury in its inception, at a discount greater than the legal rate of interest.

All of which requests except the first clause of the first request, the Court refused to give in charge, but charged the contrary to be the law, and counsel for plaintiff excepted, and on these several exceptions assigns error.

HINES & HOBBS; STROZIER & SLAUGHTER, for plaintiff in error.

VASON & DAVIS; and R. F. LYON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The language of the will is, "that all the property hereby given to my daughters, is given to their sole and separate use, not subject to the debts or contracts of their present or any future husbands."

Words similar to the latter of these words, namely, to the words, "not subject to the debts or contracts of their present, or any future husbands," have been held, in two cases, by this Court, to impose a restriction to some extent upon the wife's power of alienation, viz: to the extent of preventing her from alienating, or binding the separate property, for her husband's debts; one of these, was a case decided at Savannah, January Term, 1858; the other, the case of *Johnson vs. ———*, decided at Macon, January Term, 1858.

Such words seem to manifest a clear purpose in the donor, that the property is not to go in payment of the husband's debts. But it would go in payment of those debts, if the wife could take it, and with it, pay the debts. The words

therefore, seem to manifest a clear purpose, that she is not to have the power to do this?

This is the view which this Court has taken of such words. The will in this case, however, was made in Alabama; and it is insisted, that the will is to be read by the law of Alabama, and that the Courts of Alabama, take a different view of such words. But we do not find that they do. The two cases cited to show that they do, (17 *Ala. R.* 617. *Do.* 797.) fail to show it. They were cases containing no such words, but merely words creating a separate estate in the wife.

We think, then, that the words in this case, were such as to deprive Mrs. Scott of the power of mortgaging the property, for the purpose of paying off the debts of her husband. The effect of the mortgage and the note it secured, *was* to pay off the debt of the husband, so far as the holder of it; Keaton, was concerned, though not so far as Mrs. Scott herself was concerned, for the debt was transferred to her. But paying it off, so far as Keaton was concerned, was enough; a payment of that sort was one of the very things intended to be guarded against. Besides, at bottom, no payment she could make would be more than that. Suppose the notes had not been transferred to Mrs. Scott, but had been receipted in full, and extinguished, still, she would have had the right to recover the amount of the notes out of her husband, merely by suing him for so much money paid to his use. And in every case in which, the separate property went to pay the husband's debts, an action of this sort would result to the wife. To say, therefore, that the words, did not mean to prohibit any payment of the husband's debts, which should leave to the wife a right of action for reimbursement, against the husband, would be to say, that they were to have little if any, practical effect.

Consequently, we think the mortgage void.

If the mortgage was void, the introduction of the evidence going to show the consideration on which it was founded,

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would have been useless. So, we think, that the Court was right in excluding that evidence.

The other exceptions were waived.

Judgment affirmed.

EDMUND H. WORRILL, executor of David Shelton, plaintiff in error, vs. **JOHN B. WRIGHT**, adm'r. of Mary Martha Shelton, deceased, defendant in error.

A will containing a limitation over after a failure of issue, made before the passing of the Act of 1854, prescribing a rule for the interpretation of such words, but the testator dying after the passing of the Act, shall be interpreted as directed by that Act,

Equity, from Talbot county. Decision on demurrer by Judge LAMAR, March Term, 1858.

John B. Wright, administrator of Mary Martha Shelton, deceased, filed his bill against Edmund H. Worrill, executor of David Shelton, deceased, alleging that David Shelton died leaving a will, which was duly proved and recorded; and that E. H. Worrill, executor therein named, took upon himself the execution of the same; that by said will said Shelton gave and bequeathed to Mary Martha Shelton the following negro slaves, to-wit: Mary, a woman, and her children, viz: Fanny, Cherry, Julia, Cornelia and Louis; also Edmund, Virginia, Jim, Patterson, Davy, Emily, Ellick and Mary, together with the sum of \$3000 00 in money, as specific legacies, to be her own right and property absolutely and unconditionally; that said Mary survived the said David, and afterwards, in 1855, she died intestate; that said executor, since the death of said David, has hired out annu-

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ally said negroes and received therefrom large sums of money; that said executor has paid all the debts of said estate, and has still sufficient in his hands to pay off all the legacies given by said will; that during the life of said Mary Martha, he did not pay over to her the said legacy or any portion of it, nor has he since her death paid over the same, or any portion to complainant, but has failed and refused so to do, on the ground, that said legacy reverted on the death of complainant's intestate; whereas complainant denies the same and charges that the said legacy vested absolutely in said Mary Martha on the death of said David; and that he ought to receive the same in his capacity of administrator.

The prayer of the bill is that the executor be made to account for and deliver up the negroes, and money, &c.

The parts of the will upon which the bill is based, are in the following language:

"I hereby give and bequeath to my natural daughter Mary Martha Shelton, the following negro slaves, to-wit:" (same as are named in the bill.)

After directing the balance of his negroes to be divided into four equal parts, and providing specifically for his wife during life or widowhood, he goes on to say in the will:

"All the rest and residue of my estate, real and personal, whatsoever and wheresoever, of what nature, kind and quality soever, the same may be and not herein given and disposed of (except a small double barreled shot gun, which I hereby give my daughter Sarah) I wish to be sold by my executor hereinafter named, either at public or private sale, as to him may seem best; and of the monies arising from the sale of the same, I hereby direct and empower my executor hereinafter named to pay to my said natural daughter Mary Martha Shelton the sum of three thousand dollars. * *

"And should my natural daughter Mary Martha die without issue also, the negroes herein given to her are to return back to my estate, and be divided between my heirs at law. * * * * And the negroes and money

herein by me given to my said natural daughter Mary Martha, are for her sole and separate use, benefit and enjoyment."

"And to my friend Edmund H. Worrill I commit the management of her property, the care of her education and the guardianship of her person; and should he die before executing this trust, then to my friend Alexander R. Leonard I commit the guardianship of the person and property of my said natural daughter, with the request that he will take good care of her property, treat her kindly, watch over her welfare, and see that she is properly educated."

"And should any of the negroes I have herein given to my said natural daughter die, or become valueless from any cause or casualty, my executor hereinafter named is hereby authorized and fully empowered, in the place of such to put other negroes of like value, as near as the same can be ascertained."

Defendant demurred to the bill for want of equity, and moved to be dismissed from other or further answer to the same; which the Court overruled. Whereupon defendant excepted, and assigns the same as error.

WM. DOUGHERTY ; SMITH & POW, for plaintiff in error.

A. F. OWEN ; STUBBS & HILL, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The principal question presented in this record is, whether the provision in the will, that on the death of the natural daughter of the testator without issue, the negroes given to her in the will, are to return to the estate of the testator, to be divided among his heirs at law, is a legal provision.

It is unnecessary to go into the enquiry whether the terms of the will declaring a reversion of the negroes to testator's estate in the contingencies mentioned, would create an estate fail, if used in a will of lands in England, for the purpose of

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ascertaining whether the limitation over to the heirs at law of testator is void, under the statute of this State. The Act of 17th February, 1854, settles that. The gift over is good under that Act, the legal import of the terms used being now a definite failure of issue.

It is argued that the Act referred to was passed after the will was made, which bequeathed the property to the intestate of plaintiff in the Court below, and that that Act does not change the rule of construction in regard to wills already made. A will cannot take effect until the death of the testator. It is, in fact, no will before. It passes and vests no right prior to the death. Such is not the case with other instruments made and executed for a consideration; they always pass an interest of some sort, and those instruments, whatever they may be, are irrevocable, except with the consent of the parties to them. A will may be made and signed with all the formalities required by the law, and it may be then delivered over to one of the persons named as a legatee therein, and yet it passes no right, and is not binding upon the person who makes it, he being still in life. He may change or annul it at his pleasure. The Legislature no doubt, intended to change a legal rule of construction immediately, when the change could not interfere with vested rights. The old rule it considered as, in many cases, disappointing the intention of testators and others, limiting over estates, when no corresponding public advantage was gained by its enforcement. Whether they took a correct view of the subject cannot be determined but by the practical operation of the new rule. But in construing the Act we must have respect to the object of the Legislature. Mr. Dwarries quotes a valuable rule from a distinguished author on this subject, who says that "that must be the truest exposition of a law, which best harmonizes with its design, its objects and its general structure."

To give this Act the interpretation, that the rule, which it prescribes, should apply to wills and other instruments,

which could have no effect whatever in passing a right from one person and vesting it in another, (although signed and delivered before the Act) prior to the passing of the Act, would seem to harmonize best with its design and object. Indeed, transpose half a dozen words, and we would have, perhaps, a correct reading of the statute, and one that would harmonize with the Legislative intention. Let it be read thus: "That after the passage of this Act, all wills, testaments and other instruments made and executed, by which property, either real or personal, is limited over, so as to vest in some other person, &c."

The words "made and executed" would not refer to the time of the passing of the Act, but to the substance of the will or instrument; that if it should be so made and executed as to limit over property, real or personal, so as to vest in some other person, &c.; and the words "after the passage of the Act," would refer to the time at which the new rule of construction would go into effect, viz. *immediately*.

But allowing the words to remain as the Legislature has placed them, and we think it cannot apply to wills made by testators who died after the passing of the Act.

This cause was argued before this Court exclusively on the claim set up by the complainants to the negroes and their hire, without reference to the legacy of three thousand dollars, and upon that view, excluding the pecuniary legacy from our consideration, we reverse the judgment of the Court below.

Judgment reversed

Chance vs. Summerford.

JAMES CHANCE, defendant in error, vs. HENRY SUMMERFORD, defendant in error.

- [1.] Record of a cause between other parties admitted to prove that there was a judgment.
- [2.] Evidence admissible to prove that such judgment was paid, and by whom it was paid.
- [3.] Note sued on no part of the record of the judgment obtained thereon; and if a copy be admitted in evidence without objection, it may be considered by the jury.

Assumpsit, from Baker county. Tried before Judge ALLEN, May Term, 1858.

Chance made his note, which B. N. Scott and Henry Summerford endorsed to the Central Bank of Georgia. After the maturity of the note, the same was sued to judgment in Houston county, and execution issued thereon.

Henry Summerford paid off the *fi. fa.* It appears, from the record, that Chance having removed from the county of Houston, was not served with the writ.

Summerford sued Chance on the debt after he obtained control of the *fi. fa.*, and tendered in evidence on the trial the transcript of the record of the suit and execution against him from the county of Houston, and therein the evidence of payment of the *fi. fa.* by him; and defendant's counsel objected to its admission. Which objection the Court overruled, and defendant excepted.

Plaintiff proposed to read the answers of Warren and Summerford to interrogatories, proving the transfer, after the payment of the execution, to Summerford, the plaintiff. Defendant's counsel objected to their answers being read, which objection the Court overruled, and defendant again excepted. The answers were read.

Plaintiff here closed his case, and the defendant moved the Court for a non-suit on the grounds taken in the *rule nisi* for a new trial; which motion was refused.

The jury found in favor of the plaintiff.

And defendant moved the Court for a new trial on all the points taken by defendant, as above stated and overruled, and also on the grounds that the verdict of the jury was contrary to law, and that the verdict of the jury was contrary to the evidence; which the Court overruled.

Whereupon defendant excepted, and assigns the same as error.

P. J. STROZIER, for plaintiff in error.

R. F. LYON, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The exemplification of the case in favor of the Central Bank against the endorsers of the plaintiff in error was admissible for the purpose of proving the recovery of the debt against them by the bank, and the evidence of Warren and Summerford was admissible to prove the payment of the money by the defendant in error. 1 *Greenleaf's Ev.*, secs. 538, 539.

[2.] The counsel for plaintiff in error moved for a non-suit on the grounds taken above, and overruled by the Court, and to the refusal of the Court to award it he excepted. Having sustained the decision of the Court below in admitting the above stated evidence, it follows that it must be sustained in refusing a non-suit; and of course, so far as the motion for a new trial is based on allegations of error in the Court for overruling exceptions to the testimony and refusing the motion to non-suit the plaintiff, the judgment of the Court below must be affirmed.

[3.] The grounds that the verdict was contrary to law, and that it was contrary to the evidence, must be overruled also. There are two copies of the note sued on by the Central Bank, sent up in the record. One of these copies has the names of the endorsers, and the other has not. They are properly, no part of the record in the Central Bank case, and

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if they had been objected to as inadmissible, they must or ought to have been rejected, whether they were incorporated in the exemplification or not. If the original note had been offered, it ought to have been admitted upon proof, or without proof if not objected to for want of it. The copy seems to have been admitted without requiring the party to account for the original, or to make proof of its authenticity. This evidence was before the jury, and without objection, unless the counsel for plaintiff in error considered that he was objecting to it as a part of the record, which, as we have said it was not.

Judgment affirmed.

JOHN R. COOK, plaintiff in error, vs. JOHN BARNETT, defendant in error.

[1.] An action, (set off), to recover back money lost at cards, founded on the Act of 1764, against lotteries and gaming is not one of the actions for the not bringing of which, the non-residence of the parties subject to them, is made an excuse by the limitation Act of 1806, or that of 1839.

[2.] In such an action, the winner is compellable to discover the gaming, under the Discovery Act of 1847, and the Acts amendatory of that Act.

Complaint, from Houston county. Tried before Judge LAMAR, April Term, 1858.

Barnett sued Cook on a due bill for \$220, payable to him, dated March 18, 1854.

To this Cook pleaded this plea, that before and at the time of the institution of this action, the plaintiff was and from thence, hitherto hath been and still is indebted to defendant in the sum of \$800, won by plaintiff of him at a game of cards

about the 12 March 1854, which he was ready and willing to credit with the amount of the due bill, and asked a verdict and judgment in his favor for \$580.

The suit was commenced on the 2d of September, 1856.

The plaintiff read in evidence the due bill and closed his case.

Defendant offered to read in evidence the answers to certain interrogatories propounded to plaintiff, which stated that the due bill was given in Albany a few days after he (plaintiff) had won from defendant about \$800 at cards, which sum was paid as won. This due bill was given for money loaned, which was not loaned to bet with and was not won of defendant after it was loaned, as he never played with him after the loan. The time he won the \$800 was the only time he ever played with defendant, and after they quit playing, defendant owed him nothing for he paid as he lost.

The answer also stated that the plaintiff was and had always been a citizen and resident of North Carolina, and that he left Georgia some ten or fifteen days after winning the money.

The Plaintiff's counsel objected to reading the said answers in evidence, upon the ground that the subject matter of defendant's set off was barred by the statute of limitations, and that they tended to criminate plaintiff.

Which said objection was sustained by the Court, whereupon defendant's counsel excepted.

The verdict of the jury was in favor of the plaintiff for the full amount &c. On the exception error is assigned.

COOK & MONTFORT, for plaintiff in error.

HUNTER & ELLIS, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

The Court below held, that, according to the offered evidence, the set off was barred by the statute of limitations.

The counsel for Cook admit this decision to be right, unless it is contrary to something, in the limitation Act of 1806, or that of 1839, but they say, that it is contrary to the provision in those Acts, respectively, relating to non-residents.

The provision in the Act of 1806, (an Act which revives the Act of 1767,) is, that, "if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action of trover, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions on the case for words, be, or shall be, at the time of any such cause of action given or accrued, fallen, or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or where the defendant shall remove out of the jurisdictional limits of this State, that, then, such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as before is limited, after their coming to, or being of, full age, discover, of sane memory, at large, or the return of the defendant into the same, as by other persons having no such impediment should be done."

The benefit of this provision, is given to those entitled to the sort of actions referred to, by the limitation Act of 1767, the revived Act.

[1.] But the plea of set off in the present case, even if considered as an action, is not one of *those* actions. It is founded on the Act of 1764, to suppress lotteries and prevent gaming; or on the Act of 1765, to amend that Act; and the Act of 1767, does not refer to any action founded on either of those two Acts.

A similar remark is to be made as to the Act of 1839. That Act includes only cases "founded on bonds, or instruments under seal;" and "upon notes, and other acknowledgements under the hand of the party." This set off not being founded upon anything of these kinds, the case made by it, is not within the Act of 1839.

We think, then, that the Court below was right, in holding the set off barred by the statute of limitations.

That Court also held, that the answers ought not to be read, because they would criminate the party making them, Barnett.

[2.] The decision of the other question, being such as it was, renders it unnecessary to decide the question here arising. Still, we think it proper to say, that we regard this ground as insufficient. True, the Act of 1764, says, that persons liable to be sued under it, shall be obliged "to answer upon oath such bill or bills in Equity, as shall be preferred against" them; and the answers in this case were not answers to a bill in Equity, but, to interrogatories propounded under the late discovery Acts; yet, according to those Acts, the answers they provide for, "shall be evidence at the trial of the cause, in the same manner, and to the same purpose and extent, and upon the same condition in all respects as if the same had been procured upon a bill in Chancery for discovery." *Cobb Dig.* 465, 726.

Judgment affirmed, but not on this ground.

RANDAL C. GEIGER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

In cases on the criminal side of the Court, in which defendants are entitled to a trial on demand, the presiding Judge cannot order a mistrial but for providential cause &c., without the consent of the defendant.

Assault and Battery, from Randolph county. Tried before Judge KIDDOO, May Term, 1858.

Geiger vs. The State.

It appeared that a jury was empaneled, and qualified to try Geiger at the Term at which the bill of indictment was found, a demand for trial made by him in the usual manner, and no trial had; and no trial was had at the Term next succeeding, though there was a jury empaneled and qualified to try him and a demand for trial, made in the usual manner, again placed upon the minutes. His counsel then moved that he be absolutely discharged and acquitted of the offence charged in the indictment and the motion was refused by the Court upon the ground:

That the defendant had been granted all the trial in the power of the Court to give him, the jury having made a mistrial at both Terms of the Court, and that neither time was the Court bound to grant him any further trial.

The case then proceeded to the jury and again a mistrial made, the said Judge each time dismissing said juries before finding a verdict, and without the consent of defendant or his counsel.

The defendant's counsel excepted to the refusal of the Court to discharge said defendant, and thereupon assign error.

TUCKER & BEALL, for plaintiff in error.

(*Solicitor General*) HARRALL, for defendant in error.

By the Court—McDONALD, J. delivering the opinion.

At each Term of the Court at which the plaintiff in error demanded a trial, he was put on his trial, but the Court each time dismissed the jury, before the finding of a verdict, and ordered a mistrial. The record does not disclose any cause for ordering a mistrial at either Term of the Court. This Court has held that the Court may, ordinarily, at its discretion, direct a mistrial. (A case in which the defendant has a statutory right to a trial, however, forms an exception.) In that case the consent of the defendant must be had, or the mistrial must be the effect of inevitable accident; such as the death

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or sickness of the Judge or one or more of the jury, &c., &c.

The provision of the statute was intended to secure to defendants a speedy trial, and confers on them a right which the Court can neither control nor withhold.

Judgment reversed.

RHODERICK McKENZIE, plaintiff in error, vs. **LEMUEL T. DOWNING**, Ex'or., defendant in error.

To complete a gift, *mortis causa*, there must be a delivery of the thing given.

Trover, from Muscogee county. Before Judge Bull, May Term. 1858.

It appeared upon the trial that Kenneth McKenzie, a day or two after making his will, said to Dr. Ellison his physician, that in arranging his business he had forgotten an important matter, and feared it was then too late to arrange it, that it was in regard to some money he had in Scotland. Ellison told him it was not too late, and sent for Wm K. Moore, who came and wrote, at the dictation of McKenzie, the following check which was signed by McKenzie, and witnessed by the parties, whose names appear.

"INVERNESS, 8 July, 1854.

Pay to Rora McKenzie or order four thousand pounds sterling or whatever balance there may be remaining in the bank due me at this time.

K. McKENZIE.

To the MANAGER of the BANK OF SCOTLAND.

Attested by,

WM K. MOORE, attorney at law, *Dalton, Ga.*

F. C. ELLISON, M. D., *Columbus, Ga.*

J. D. HAMILTON, *Stone Mountain.*

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McKenzie said but little, except to dictate how he wanted the check written. He was very weak and feeble, talking very seldom, and then in whispers; making himself understood principally by signs. After signing the check it was in the hands of Ellison, who asked McKenzie what he should do with it, and he either looked towards or pointed to his trunk, in which were his clothes and his will he had made the day before. Ellison asked him if he should place the check with the will; and McKenzie assented by bowing his head. It was then placed in the trunk and delivered with the same to L. T. Downing, who was appointed executor by the will.

James Lyne and Robert McKennon testified, they were agents and accountants of the Bank of Scotland, at Inverness, that the amount to the credit of McKenzie, in said bank was £407,17d,3s; and the check, drawn by McKenzie, would have been good for that amount only.

It was admitted, a demand for the check had been made of the executor and that he refused it, that Rhoderick and Rora are the same person, that Rhoderick is the only brother of K. McKenzie; that at the date of the check he was and is now a citizen of Scotland, and that L. T. Downing is the executor of K. McKenzie, and the check in his possession.

Plaintiff here closed his case and defendant moved a nonsuit, which motion the Court sustained; whereupon plaintiff's counsel excepted and assign error.

G. E. THOMAS; and R. WATSON DENTON, for plaintiff in error.

L. T. DOWNING, for defendant in error.

By the Court.—McDONALD J. delivering the opinion.

There was no delivery of the check to the payee or to any one else for him. It remained in the custody of the drawer. It is presumed that he supposed it was sufficient to entitle the

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payee to the money, on his death. In that he was mistaken, and however, manifest his intention it cannot be carried out, consistently with a wise rule of law, which requires for the completion of a gift of this sort a delivery of the thing given.

Judgment affirmed.

WILLIAM RICHARDSON, plaintiff in error, vs. **MARY JANE ROBERTS**, defendant in error.

A verdict is not to be set aside on the ground that it was obtained by perjured evidence, unless it appear to the Court, that the verdict could not have been obtained without that evidence.

Equity, from Crawford county. Decision by Judge **LA-MAN**, at chambers.

The complainant filed a bill for relief and injunction, alleging that a verdict had been obtained against him in the Superior Court of Crawford county, at the instance of defendant, in an action on the case for words, by the wilful and corrupt perjury of Nathaniel Griggs, a witness sworn in said case for the plaintiff; that it was not until after the final judgment in said case had been rendered, that complainant ascertained that he could prove that the testimony of Griggs, on said trial, was false, by several witnesses, whose depositions complainant attaches to his bill, and fully makes out the allegation of perjury on the part of Griggs. Complainant, at last term of the Court, preferred an indictment against Griggs, which was returned, true bill for perjury committed on the said trial; that he intends to prosecute said indictment, and believes a conviction can be had thereon.

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That on the said verdict obtained against him, execution has issued; and the defendant who is plaintiff *in fieri* is proceeding to collect the same, and that at law, he is unable to resist it, and prays it may be enjoined until an issue is made up, on the facts herein charged, and if found true, a new trial be granted him in said case of slander; and until a trial is had on said indictment against Griggs, and if Griggs is convicted, that the complainant have leave to move to set aside the judgment in said slander suit obtained against him.

The facts of this bill will be found in the case of William Richardson against Mary Jane Roberts. 23 Ga. 215.

The Judge, upon reading the bill, refused the prayer in the following language.

"The injunction and relief sought by this bill are predicated on the ground that the verdict of the jury was obtained by the perjury of Nathaniel Griggs, a witness in the cause, and on the newly discovered evidence of Span, Ragan, Samuel Gassett and Eveline Gassett, by whom the perjury would be established.

The perjury complained of is, that Griggs, on the trial, swore that Roberts, the husband of defendant to this bill, and plaintiff in the action of slander, died in October, 1847, at his house, and that she gave birth to a child in April, 1848. The affidavits of Ragan and Mr. and Mrs. Gassett, state that Roberts died in Macon county, in the year 1845; that the defendant in this bill continued to reside there some two or three years thereafter without giving birth to a child. There is an admitted conflict in the evidence, which it is considered established the fact that Griggs swore falsely, both as to the time of Roberts' death, and the period which elapsed between his death and the birth of the child. But conceding the fact that Griggs swore falsely, and was perjured, and that Mrs. Roberts gave birth to an illegitimate child in 1848, and that the newly discovered evidence would prove it; would this establish the truth of the slanderous words uttered by

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the complainant against the defendant in 1854? There were two counts in the action of slander, charging, in substance, the defendant in this bill with having given birth to an illegitimate child; that Griggs was its father, and that he, Griggs, kept her from marrying for the purpose of cohabiting with her. The complainant, by interposing the plea of justification, admits the speaking of the words, and it is incumbent on him to support their verity by proof.

As before observed, would the admitted perjury of Griggs, and the fact conceded, that the child born in 1848 was illegitimate, and that Roberts died in 1845, establish the truth of the plea of justification, to-wit, that the illegitimate child was Griggs', and that he and the defendant to this bill were cohabiting together in December, 1854? I think not. The defendant's character, such as it was at the time of speaking of the words, is put in issue. She might have had an illegitimate child in 1848, and by reformation and amendment in her conduct, acquired a very different character for virtue and chastity, some six or seven years thereafter; it was then entitled to such protection as it merited. Again, expunge Griggs' testimony entirely from the record, and I consider the remaining testimony in the case would fully sustain the finding of the jury; or in other words, the jury would justly return the verdict they did, without Griggs' testimony.

Entertaining the views and opinions above expressed, I refuse to sanction the bill, for the reasons given.

HENRY G. LAMAR, J. S. C. M. C.

December 14th, 1857.

To which decision complainant's counsel excepted, and assigns the same as error.

HUNTER, for plaintiff in error.

GEORGE W. NORMAN, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the Court right in refusing its sanction to this bill?
We think so.

“Any verdict or judgment, rule or order of Court, which may have been obtained or entered up, shall be set aside, and shall be of no effect, if it shall appear that the same was obtained or entered up in consequence of wilful and corrupt perjury; and it shall be the duty of the Court in which such verdict, judgment, rule or order, may have been obtained or entered up, to cause the same to be set aside upon motion and notice to the adverse party; but it shall not be lawful for the said Court to do so, unless the person charged with said perjury, shall have been thereof duly convicted, and unless it shall appear to the said Court, that the said verdict, judgment, rule, or order, could not have been obtained or entered up, without the evidence of such perjured person.” 8 Sec. 8 Div. Penal Code.

The person here charged with the perjury, Griggs, has not, as yet, been convicted of the charge. But let that pass.

Is it true, that it appears here, that the verdict “could not have been obtained” “without the evidence” of Griggs?

By no means.

The slanderous words declared on, were, in substance, that Mary J. Roberts had had a bastard by Griggs; and that he was keeping her unmarried for his own purposes. The speaking of these words was proved by others, than Griggs. Besides, there was a plea of justification.

The plaintiff's case, then, in the slander suit was fully made out without the evidence of Griggs; and she was entitled to recover without his evidence, unless the defendant, Richardson, proved his plea of justification.

As to that plea. Leaving Grigg's evidence out of the question, it is by no means clear, that the rest of the evidence showed him the father of Mary J. Robert's child, assuming it to have

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been a bastard; or showed him keeping her unmarried for his own purposes. See the evidence.

Even the newly discovered evidence itself would fail to make out these charges, however it might serve to show, that the child was a bastard.

It must follow, then, that it is *not* true, that it appears here, that the verdict "could not have been obtained without the evidence" of Griggs.

This being so, the section aforesaid—of the Code, comes in, and makes it unlawful for the Court to set aside the verdict, even though it may be true that Griggs was guilty of perjury, in his evidence.

And, certainly, bills of this sort ought not, for reasons most obvious, to receive any encouragement.

Judgment affirmed.

GARY G. FORD, plaintiff in error, vs. STEPHEN R. SMITH,
defendant in error.

[1.] The rule that words spoken before and at the making of a written contract merge in the contract does not apply when the words spoken themselves constitute a contract, the parties to which, are not the same as the parties to the written contract.

[2.] When a contract has been repudiated by both of the parties to it, it ceases to be the criterion for measuring the rights and liabilities between the parties to it.

[3.] Even when the work has not been done according to the contract, yet if received, and of benefit of the party receiving it, he shall pay for it a sum equal to the value of the labor and materials.

Assumpsit, from Worth county. October Term, 1858,
Judge Powers, presiding.

Ford vs. Smith.

Smith brought an action against Ford, alleging in the first count, the making of a contract with Ford, to furnish materials and build him a house by a certain time, viz: the 18th of April, 1855, for which Ford was to pay him a certain sum; that after performing a certain amount of labor, Ford discharged him. The second and third counts are *quantum meruit* counts. The contract was proven; the circumstances attending its non-completion, and the value of the materials and labor actually furnished and performed.

Plaintiff proposed to prove that it was agreed before, at the time of, and after the making of the contract, that one R. G. Ford was to saw the lumber; defendant objected, and the Court overruled the objection.

The Court charged the jury, that plaintiff sought to recover on two counts, and explained to the jury the nature of special contracts, and the law applicable to them; and charged them that the plaintiff in this case could not recover on the special contract, but if they believed, after plaintiff had done considerable work on the house, defendant, taking advantage of his failure to comply with the contract, took possession of the house, and refused to let plaintiff complete the job, that plaintiff was entitled to as much as his labor and materials were actually worth, without regard to the special contract; that defendant could have protected himself under said contract, by refusing to take the house; if he took it voluntarily, and enjoyed it, he ought to pay what it was worth, and no more. To this charge counsel for defendant excepted.

Defendant requested the Court to charge, that if defendant was induced to take possession by the promise of Smith to go on immediately and finish the house, that such possession was no recognition of a compliance with the contract by Smith, and plaintiff cannot recover unless the evidence shows an enlargement of the time for finishing the work. The Court refused this charge, and modified the same by saying, that it was the law in a proper case, but if he went in this

way, and then refused to let Smith finish the building, it was the same as if he had gone in without Smith's consent.

Defendant also requested the Court to charge, that the failure of R. G. Ford to saw the lumber, was no excuse for Smith; which the Court did not refuse to give, but instructed the jury that the request was outside of the case.

Defendant also requested the Court to charge, that by the terms of the contract, Smith should have done the work in a workmanlike manner, by 1st of April, 1855, and that the burden of proof was on him to show an excuse for not complying with his contract. This the Court refused, but charged the jury, that Smith did not ask, and could not recover, on the special contract; that they need not consider the special contract, and it was unnecessary to give them the charge. To the charges and refusals defendant excepted.

A new trial was moved for by defendant, because,

1st. Of the admission of the evidence that R. G. Ford was to furnish the lumber.

2d. Because the Court erred in its charge to the jury; and

3d. Because the jury found contrary to law, evidence, and the right of the case.

This motion was overruled, and defendant excepted.

WARREN & WARREN, for plaintiff in error.

J. J. SCARBOROUGH, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the refusal of the Court to grant a new trial, right? This is the question.

The first ground of the motion for a new trial, was, the admission of evidence to show, that one R. G. Ford was to furnish the lumber.

This evidence was, that it was verbally agreed by and between R. G. Ford, Gary G. Ford, the plaintiff in error, and

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Smith, the defendant in error, that R. G. Ford should *see* the lumber for the buildings, for which he was to be paid in a particular way by Gary G. Ford, who himself was to be repaid in a particular way, by Smith; and, that the words constituting the agreement, were spoken *at* and *before* the making of the building contract, as well as afterwards. That contract was in writing.

The objection to the evidence, was, that it would vary the written contract.

[1.] But R. G. Ford was not a party to the written contract. The sole parties to that, were G. G. Ford and Smith; and it was not in their power, to do any thing to affect R. G. Ford's rights arising under a contract to which, the three were parties. Therefore, the rule that words spoken before and at the time of the making of a written contract, merge in that contract, does not apply.

And, then, these same words were also spoken *after* the making of the written contract.

We think, that there is no validity in the first ground of the motion.

The next two grounds of the motion, may be reduced to one; namely this, that the Court erred in all of its charges and refusals to charge.

The part of the charge objected to, was the part in which, the jury were told, that Smith was entitled to recover so much money as his labor and materials "were actually worth, without regard to the special contract"—it being contended by the counsel for Ford, that the measure of what Smith would, in the case supposed in the charge, be entitled to recover, was the worth of the labor and materials according to the *contract price* and not their worth according to their "*actual*" value.

The proof was, that Smith had failed to comply with his part of the contract; that he had not done the job within the time stipulated; and that some of the part which he had done, was not executed according to the contract.

As to so much of the job as was not executed according to the contract, it is obvious, that its value *could not* be measured by the contract price.

Again, the proof was, that Smith abandoned his count on the special contract; and that Ford also finally, repudiated that contract, insisting, that Smith had not only failed to comply with it, but had failed to comply with a second contract or promise, viz: one that, if Ford would take possession of the house in its incomplete state, he, Smith, would go on immediately, and complete the house.

The special contract, then, may be considered as having been rejected by both of the parties to it.

[2.] This being so, neither party retained the right of appealing to that contract, as the thing to govern in settling their respective rights and liabilities. Therefore, Ford did not retain the right of appealing to the contract price, for settling the value of the work done by Smith.

Consequently, the value of that work had to be ascertained in the ordinary way, viz: by a reference to its general market value. And its market value would be its "actual" value.

In *Freeman vs. Greenville Masonic Lodge*, (22 Ga. R. 184,) the part of the work that was done, was done according to the contract; and the employer accepted this part as done under the contract—not at all repudiating the contract, but only making a question as to what the contract was. It is, therefore, of no consequence to this case, that in that case, we thought the value of the part of the work done, was to be found by reference to the contract price. And even in that case, the effect of the decision was, to make the actual or "*real*" value of the work done, the criterion of the amount of the liability.

We think, then, the objection made to this charge, not well founded.

The first request was too absolute.

[3.] Suppose it true, that Ford went into possession of the house only on the promise of Smith to go on immediately,

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and complete the work; and that this was all the "enlargement of the time," that there was; and, that Smith failed to go on immediately and complete the work; and, yet, that Ford kept possession of the house, and derived a benefit from it, would he not be liable to pay Smith something for this benefit? We think that he would. In *Chappel vs. Hickey*, 2 C. & M. 214, Bayley B. says, "The rule is, that if the contract be not faithfully performed, the plaintiff shall be entitled only to recover the value of the work and materials supplied." 1 *Smith's Lead. Cas*; note to *Cutter vs. Powell*, 18; see also, *Boston vs. Butler*, 7 East. 479, and the other cases on this point referred to in that note.

The second, and only remaining request was, to charge, that by the terms of the contract, Smith should have done the work in a workmanlike manner by the 1st of April, 1855, and that the burden of proof was on him to show an excuse for not having so done it by that time.

The ground on which the Court put its refusal to grant this request, seems to have been, that the plaintiff, Smith, had abandoned his count on the special contract. But it does not follow, that, *merely* because a party to a special contract, chooses to abandon the contract, he can set up an implied contract, and recover from the other party on the common counts. He must show some reason why the other party is not still entitled to hold him bound by the special contract; as, that the other party has waived a compliance with that contract; or has repudiated the contract, whilst receiving a benefit under it.

This request, then, was, we think legal.

It was in writing.

And the new trial Act of 1854, makes it the duty of this Court, to grant a new trial "in all cases where the presiding Judge may" "refuse to give a legal charge in the language requested, when the charge so requested is submitted in writing." *Acts*, 47.

The refusal of this request, then, makes the present ground of the motion for a new trial valid, and compels this Court to order a new trial.

The third ground is, that the verdict was contrary to the evidence, and, as a new trial is to be had any way, it is best, probably, not to decide that ground.

Judgment reversed.

JOHN A. DENNARD, and ALFRED KEARSEY, security on appeal,
plaintiffs in error, vs. GREEN B. MAYO, defendant in error.

Surety to appeal bond, against whom the plaintiff failed to enter judgment at the Term when the verdict was obtained, may oppose a motion, at a subsequent Term, to enter judgment against him by any evidence which will establish fraud in the verdict against him, and he is not compelled to make affidavit of the truth of the facts on which he relies.

Motion to enter judgment against security on the appeal,
from Lee. Tried before Judge ALLEN, March Term, 1858.

Plaintiff below made the motion to the Court, when defendant Kearsey plead that said judgment and execution in this case against principal was paid off and discharged, and that the said judgment was obtained by a fraudulent collusion of the plaintiff and defendant Dennard, who was insolvent, and that the note was paid off before judgment; and that the plaintiff had a mortgage upon the property sufficient to pay the note, which was turned over to the plaintiff in satisfaction of the note, and with notice the plaintiff got the judgment in fraud of the rights of the defendant, Kearsey.

Dennard and Kearsey vs. Mayo.

The Court overruled the pleas, on the ground that they were not verified. Defendant's counsel excepted, and assign error.

McCAY & HAWKINS, for plaintiff in error.

PEARMAN & KIMBROUGH, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

The defendant in error, as plaintiff in the Court below, recovered a verdict on the appeal trial, against John A. Dennard. Alfred Kearsey was the security of Dennard on the appeal bond. The defendant in error entered a judgment on his verdict on appeal, against Dennard, the principal, alone. At the last Term of the Court in which the verdict was rendered, the defendant in error, plaintiff in the Court below, moved to enter judgment against the plaintiff in error, as security. He appeared and filed as objections, that the judgment was paid; that a note had been given in satisfaction of the same; that John Dennard was insolvent at the time the payment was made, and that the judgment was fraudulently obtained, by collusion and concert between the defendant in error, and the defendant in the Court below, Dennard. The Court overruled the objections, and allowed the defendant in error to enter judgment against the surety. On this judgment of the Court below, error is assigned. The plaintiff in the Court below, on obtaining a verdict on the appeal trial, had a right to enter a judgment against the principal and surety, jointly or severally, within four days after the adjournment of the Court. *Cobb*, 494-8. If he omitted to do it, he must move the Court for leave, and give notice of the motion to the opposite party. This he did. It then became the right of the surety to oppose the motion, and to prove any matter against it, showing that the verdict was fraudulent and void, as to him.

Dennard and Kearsey vs. Mayo.

If the plaintiff below had received payment before the trial Term, and notwithstanding proceeded, in collusion with the principal, to take a verdict, in order to raise the money from the surety, or had otherwise fraudulently obtained a verdict, it would be competent for the surety to move to set it aside, so far as it affected his rights. Of the jurisdiction of the Court, in such a case, there can be no question. If he could, upon satisfactory proof, set such a procedure aside, he can certainly resist the completion of the fraud; and if the plaintiff can only avail himself of it, through the aid of the Court, he will not be assisted if the facts appear.

It is not necessary for the surety to make affidavit of the fraud or collusion. His defence is in the nature of a plea in bar, which need not be sworn to. It is not a plea of *puis darrein continuance*, which must ordinarily be filed on an affidavit of facts. But it is a *new* proceeding on the part of the plaintiff, made necessary by his own negligence, and the defendant has a right to oppose it, if he have merits. If the facts had been sworn to by him, his affidavit could not have been evidence for him. His defence he must sustain by other testimony than his own oath. The payment which he sets up must, of course, be proven to be an absolute payment, and subject to no condition. It is not pretended that the surety has been *released* by the conduct of the plaintiff to his injury, but that the debt *was paid*, and that the verdict is fraudulent, as to the surety.

Judgment reversed.

Weed vs. Davis.

HENRY B. WEED, plaintiff in error, vs. **JOHN A. DAVIS**, defendant in error.

A person though in debt, may in good faith make a voluntary conveyance of a part of his property, if the part which he retains, is amply sufficient to pay his debts.

Claim, in Dougherty county. Tried before Judge ALLEN, June Term 1858.

An execution in favor of Henry B. Weed, was levied on a house and lot in Albany, as the property of Andrew Y. Hampton, who was defendant *in fi. fa.*, and the property was claimed by John A. Davis.

On the trial of the claim, after the evidence and argument closed, the Court charged the jury, that if they were satisfied from the evidence that the Sheriff's deed of 8th July, 1852, under the tax sale, was in pursuance of a purchase made by defendant, Hampton, at which he paid the money, and ordered the title made to his son-in-law Davis; then they were to consider the whole transaction as a gift or advancement, by Hampton to claimant, at that time. If this was true, then the house and lot was not subject to the *fi. fa.*; unless that gift or advancement was made by Hampton to defraud his creditors, or hinder or delay them; that in determining that, they must look to the transaction itself; the circumstances of Hampton at the time, and the circumstances attending the transaction; the property he then had in his own right, and his indebtedness; and if they were satisfied Hampton was embarrassed at the time, and that this advance or gift was disproportionate to the amount of his property, as compared with what he was owing at the time, then such circumstances would be sufficient evidence of fraud, to authorize and to require them to find the property subject.

To which charge counsel for Weed excepted.

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Counsel for plaintiff, requested the Court to charge the jury, that if this property, now the subject of this claim, was on the 8th July, 1852, the property of Hampton, and by him then advanced or given to his son-in-law John A. Davis, the claimant, then the property was subject to such debts of Hampton, as were at that time in existence and unpaid, and they should so find, whether the said Hampton intended the said transaction as a fraud or not upon his creditors. Which the Court refused, and the plaintiff excepted.

The counsel for plaintiff then asked the Court a charge, which as is stated in the bill of exceptions, was refused, and there was exception to it; but the Judge said that he could not certify to it, because he did not refuse it; but charged that debts dated subsequent to the conveyance might be proven to have been debts really antecedent thereto, and that when such proof was made, they stood upon the same footing as other antecedent debts, and that the conveyance was not *ipso facto* void as to debts existing at the time of its execution.

The counsel for plaintiff tendered bill of exceptions and assigned error.

B. F. LYON; SMITH & HINES, for plaintiff in error.

STROZIER & SLAUGHTER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

Was the charge of the Court wrong?

The charge seems to amount to this; that although Hampton might have been in debt at the time when he made the voluntary conveyance to his son-in-law, Davis; yet the conveyance was not void as to the persons, to whom he was so in debt, unless the value of the land conveyed, was disproportionately great, as compared with the value of his whole property, and the amount for which he was so in debt.

If there is any law which this charge violates, it must be the 13th of *Elizabeth*, "against fraudulent deeds, alienations, &c."

That statute declares, "that all and every feoffment, gift," &c., "made to, or for," the "intent to delay, hinder or defraud creditors and others, of their"—"debts," "shall be deemed and taken, (only as against" such creditors, and others,) "to be clearly and utterly void."—*Schley's Dig.* 215.

A gift, then, to be void by this statute, must be "*made*" with "*intent*" to defraud creditors.

Now is a man's being in a state of indebtedness, however slight, at the time when he makes a voluntary gift, however small as compared with his whole property, *conclusive* evidence, that he acts from an "*intent*" to defraud the creditors out of their debts. If it is, the charge was wrong, if it is not the charge was right.

It is certain, that the statute itself does not say, that this fact shall be conclusive evidence, or even any evidence, of such intent. The statute is simply silent, both as to the kind of facts which shall be admissible on the question of this intent, and as to the degree of weight to which any facts that may be admissible on the question, shall be entitled.

And yet it is equally certain, that there have been *dicta*, and perhaps a few decisions, to the effect that this fact is conclusive evidence of this fraudulent intent. But what law they find to support themselves by, I cannot imagine. In *Hindes, lessee, vs. Longworth*, 11 *Wheat. R.* 190, the Court say: "A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under circumstances. But the mere fact of being indebted to a small amount would not make the deed fraudulent, if it could be shown, that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to a child was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The

want of a valuable consideration may be a badge of fraud ; but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side." *Story Eq. section 362.* The weight of authority is, in our opinion, in favor of the view here expressed. See note 2, to the section referred to, and note 1, to the next section, and section 365.

We think, then, that the charge was not wrong.

And if the charge was not wrong, it is plain, that it could not have been wrong to refuse the request to charge, for that was in conflict with the charge.

Judgment affirmed.

JAMES B. SMITH, plaintiff in error, vs. **WILLOUGHBY JORDAN**, defendant in error.

A. made a mortgage to B., which was not recorded until after the three months had elapsed. Before foreclosure, C. obtained a general judgment against A., the *fi. fa.* from which was levied on the mortgaged property. At the sale under this levy, notice of the mortgage was given to the purchaser.

Held, That as the judgment creditor, had gained a priority over the mortgagee, the purchaser purchased free from the encumbrance of the mortgage, notwithstanding the notice.

Claim, from Randolph county. Tried before Judge KIDDOO, November adjourned Term, 1858.

John H. Jones executed and delivered to Willoughby Jordan, a mortgage upon a certain negro slave Jim, on the 7th day of October, 1851, which was recorded in the Clerk's office, on the 21st day of January, 1852.¹

David Biggerstaff obtained a judgment against said John

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H. Jones, on the 18th day of September, 1852, upon which execution issued and was in January 1854, levied upon the said negro slave mentioned in the said mortgage, and the Sheriff, on the first Tuesday in March following, exposed the said negro to public sale at the usual place in said county, by virtue of said levy. Public notice was given of the existence of the mortgage, and the purchaser required to give bond and security for the forth-coming of the negro, to answer to the same. James B. Smith was the highest bidder, the boy was knocked off to him at the price of \$416; Smith paid the money, and the negro was delivered to him.

Willoughby Jordan foreclosed his mortgage, upon which execution issued, dated 27th day of June, 1854, which was levied upon the negro slave Jim, and James B. Smith claimed him as his property.

Upon the trial of the case, after the above facts had appeared, the counsel for claimant requested the Court to charge the jury:

That although the mortgage may be older than the judgment under which the negro was sold, still if the mortgage was not recorded within three months from the date of its execution, and the judgment was obtained before the foreclosure of the mortgage, the lien of the judgment on said negro took precedence over said mortgage, and that the purchaser of said mortgaged property at Sheriff's sale, by virtue of a *feri facias* issued upon said judgment, would obtain a good title to the same in exclusion of the lien of the mortgage.

Which charge the Court refused to give, and charged, that such would be the law, provided the purchaser did *not have actual notice* of the existence of the mortgage at the time of the sale; but if he did have such actual notice at the time, the property would still be subject to the same.

To which said refusal to charge, and the charge as given, the claimant excepted and assigns error.

The jury found the property subject to the mortgage *fi. fa.*

H. C. PERKINS, for plaintiff in error.

HOOD & ROBINSON, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

If *Shepherd vs. Burkhalter*, 13 Ga. R. 443, be right, both the charge, and the refusal to charge, were wrong. We see no reason to doubt that case. It is the right of the judgment creditor, to sell whatever his judgment binds. This right would be impaired, if purchasers were not allowed a corresponding right to buy. This corresponding right to buy, purchasers would not have, if they were liable to be affected by a notice of other liens or claims inferior to the judgment.

For the sake then, of the creditor, not of the purchaser, a notice to the purchaser in such a case as the present, can be of no effect.

Judgment reversed and a new trial ordered.

NEWTON CAMP, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1.] An indictment concludes properly, if it follows the form prescribed by the statute.

[2.] Manslaughter may be committed by killing a slave.

[3.] That a bill of indictment for manslaughter, charges facts in the body of it which constitute murder, is no ground for arresting the judgment.

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[4.] It is not necessary for the jury to incorporate in their finding the definition of the offence charged in the indictment.

Manslaughter, from Marion county. Tried before Judge WORMILL, March Term, 1858.

Newton Camp was placed upon his trial under an indictment, the language of which was as follows :

“ The grand jurors sworn, chosen and selected for Marion county, in the name and behalf of the citizens of Georgia, charge and accuse Newton Camp of the county and State aforesaid, with the offence of manslaughter, for that the said Newton Camp, in the county and State aforesaid, on the twelfth day of June, in the year of our Lord, one thousand eight hundred and fifty-seven, with force and arms and with a certain strap of leather, called a carriage trace, in and upon a certain negro man slave named Willis, the property of James M. Harvey, in the peace of God and said State, then and there being, did then and there make an assault, unlawfully, wilfully, feloniously and with malice aforethought, and the said negro man slave Willis, with the carriage trace aforesaid, which he the said Newton Camp then and there had and held in both his right and left hands, in and upon the back and in and upon the shoulders, and the loins of him the said Willis, then and there unlawfully, wilfully, feloniously and of his malice aforethought, did strike and beat, giving to the said Willis, divers wounds of which said wounds, the said Willis, then and there died. And the jurors aforesaid, on their oaths as aforesaid, do say, that he, the said Newton Camp, him the said Willis, then and there, wilfully, unlawfully, feloniously and of his malice aforethought, did kill, contrary to the laws of said State, the good order, peace, and dignity thereof.”

The jury returned the following verdict: “ We the jury find the defendant guilty of involuntary manslaughter, in the commission of a lawful act, which probably might produce such a consequence in an unlawful manner.”

Counsel for defendant then moved in arrest of judgment, on the following grounds :

1st. Because the indictment does not charge that said offence was committed contrary to the Constitution of this State, and the Act of the assembly made in pursuance thereof.

3d. Because the indictment does not charge the defendant with any crime known to and punishable by the laws of this State.

3d. Because said indictment is void, and of no effect in law, as the same does not charge and set forth any offence known to the law.

4th. Because said indictment charges said defendant with being guilty of manslaughter, and the allegation and specification in the same, do not support said charge of manslaughter.

5th. Because the verdict of the jury rendered in said case, does not find the defendant guilty of any offence punishable by the laws of this State.

The Court overruled the motion ; whereupon defendant's counsel excepted, and assigns the same as error.

BLANDFORD & CRAWFORD ; DAVIS & HUDSON ; and A. G. PERRYMAN, for plaintiff in error.

Sol. Gen. OLIVER, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The first ground in the motion in arrest of judgment, cannot be sustained. The conclusion of the indictment follows the form prescribed by the statute. Besides, it is an exception which goes merely to the form of the indictment, and cannot be sustained in arrest of the judgment of the Court. *Cobb's N. Dig.* 833.

[2.] The argument, in support of the second and third grounds of the motion, is that manslaughter cannot be com-

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mitted by killing a slave. That to kill a slave is either murder or justifiable homicide. The 19th section of the fourth Division of the Penal Code answers that argument. That section declares, that the killing or maiming of a slave shall be put on the same footing of criminality as the killing or maiming of a white person.

[3.] The fourth ground in the motion is substantially, that the bill of indictment charges the plaintiff in error, with the offence of manslaughter, when the body of the indictment makes a case of murder. The defendant had been arraigned and pleaded to the bill as it was. He pleaded not guilty.

There is ancient authority for saying that if a grand jury return a true bill for manslaughter on a bill for murder, it is void, but the reason assigned for it, is not very satisfactory, viz: That the grand jury are not to distinguish between murder and manslaughter, for it is only the circumstance of malice that makes the difference, and that may be implied by the law without any facts at all. *Bac. Ab. Indictment, Letter O.* The same reason would prevent a jury from finding a true bill for either murder or manslaughter on a bill having two counts, one charging murder and the other manslaughter, for they would have to distinguish between them in that case.

There is an authority as old as the time of Sir Matthew Hale, that if a bill of indictment be for murder, and the grand jury ignore it as to murder, but find a true bill for manslaughter, the words which give to the charge the distinctive character of murder may be stricken out in the presence of the jury, and leave so much as makes the bill stand barely for manslaughter. *Ib.*

The same authority says, the safest way is to deliver the grand jury a new bill for manslaughter. But whatever of doubt hangs over this question, in the English Courts, there is none here. The grand jury accused the prisoner of manslaughter. The body of the indictment makes a charge
 urder. If the grand jury had found a bill throughout

for murder, on the trial, the petit jury might have acquitted the prisoner of murder and found him guilty of manslaughter. The prisoner is not prejudiced by the change of a single word, manslaughter for murder. He is rather benefitted, for he cannot be found guilty of murder. He was arraigned on the indictment as it stands and pleaded not guilty. If he wished to demur to the indictment for any matter not affecting the real merits of the charge, he ought to have done it on arraignment, before pleading the general issue. It is too late after pleading the general issue, and undergoing a trial thereon; for no motion in arrest of judgment can be sustained for any matter not affecting the real merits of the offence charged in the indictment.

[4.] In regard to the last ground taken in the motion in arrest of judgment, we will remark that the law does not require the jury to find their verdict in the language of the code, although the verdict of this jury is very nearly in the language of the code. They find the prisoner guilty of manslaughter in the commission of a lawful act, which probably might produce such a consequence, in an unlawful manner. This is all sufficient to enable the Court to pronounce the sentence of the law advisedly, upon the convicted defendant. It would have been an act of supererogation to have added any other part of the definition of involuntary manslaughter in the verdict, as that the killing was not intended; for the finding of manslaughter, is a finding of the absence of intention.

Judgment affirmed.

Aycock vs. Aven, guardian.

ISRAEL AYCOCK, plaintiff in error, vs. JOHN W. AVEN, guardian of Mary Ann Aycock, minor, defendant in error.

Between the time of the adoption of the amendment of the Constitution, abolishing that part of the Constitution which conferred the "powers of a Court of Ordinary," on the Inferior Courts, and transferring those powers to the Ordinary; and the time of the appointment of the Ordinaries under the amendment, the Inferior Court of Marion county, appointed a guardian. *Held*, That the appointment was valid.

From Marion county. Appeal to Superior Court from the Court of Ordinary. Decision by Judge WORRILL.

The facts were agreed upon by counsel, and referred to the Court for decision of law.

John W. Aven was appointed guardian of Mary Aycock, minor of Joshua Aycock, deceased, by the Justices of the Inferior Court of said county, in January, 1852, and the appointment was made after the Constitution of the State was altered, so as to divest the Justices of the Inferior Court of jurisdiction in such cases, and vest the same in an Ordinary; and before the Ordinary had been elected, qualified and commissioned.

Israel Aycock moved in the Court of Ordinary to remove Aven from said guardianship, because of these facts.

The Court decided that the appointment was good.

Whereupon plaintiff's counsel excepted, and assign the same as error.

DAVIS & HUDSON, for plaintiff in error.

E. W. MILLER, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

"All civil officers shall continue in the exercise of the duties of their several offices during the periods for which they

were appointed, or until they shall be superseded by appointments made in conformity to this Constitution." *Art. 4, Sec. 14, Con. of Ga.*

We must take this provision to apply not merely to the persons in office at the making of the Constitution, but also, to those who might be in office at any time afterwards. It, therefore, is to be taken as applying to the persons who were Justices of the Inferior Court, at the time when the jurisdiction which that Court had as a Court of Ordinary, was transferred from it to the present Court of Ordinary.

And the amendment of the Constitution, making this transfer, is itself to be taken in reference to this provision, and, agreeably to the general principle of construing all instruments, is to be so construed, if possible, that it shall harmonize with this provision.

Now, although, this amendment abolishes the part of the Constitution, conferring that jurisdiction on the Inferior Courts, and substitutes itself for it, yet, it does not say, that the "officers" composing the Inferior Courts, shall not continue to exercise the jurisdiction, until they shall have been superseded by appointments made in conformity to the Constitution; nor is what it does say, that from which, this is *necessarily* to be implied.

And unless it was, it is not to be implied, for repeals by implication, exist only where the repugnancy is necessary.

We think, therefore, that the Court was right in holding, that the appointment of this guardian, was valid, although it was made after the date of the amendment of the Constitution, transferring the power of making such appointments to another tribunal.

Judgment affirmed.

Hines and Bryan vs. Mullins, Ordinary for the use &c.

ELIAS D. HINES and GEORGE H. BRYAN, plaintiffs in error, vs.
GEORGE W. MULLINS, Ordinary for the use of James G.
 Smith, guardian, defendant in error.

- [1.] A father is bound to support and educate his children, if he is able to do so, even although they may have property of their own.
- [2.] A person who has been appointed guardian, by a Court of Ordinary, and has taken possession of the property, and otherwise acted as such guardian, is concluded from saying when sued as such guardian, that the ward did not reside in the county of the Court, and therefore, that the Court had no jurisdiction to make the appointment.

Suit on bond, from Harris county. Tried before Judge
 WORRILL, April Term, 1858.

Letters of guardianship were granted to Elias D. Hines over the person and property of his children, by the Inferior Court of Harris county, and were revoked again by the same Court.

James G. Smith was then, by the same Court, appointed guardian in his stead; and brought his action on the guardian's bond of said Elias D. Hines and George H. Bryan, as security, to compel said Hines to pay over the estate of said minors in his hands. When, after the testimony and argument on both sides:

The Court charged the jury that the defendant insisted he was entitled to a deduction from the amount claimed by plaintiff, on the ground that his children had a separate estate, and that he was not able to feed, clothe and educate them in a manner suitable to their condition in life, but, nevertheless, had done so, expecting to be remunerated from their separate estate; now if you believe, from the testimony, that he was not able to support and educate his children, then make the deduction—otherwise do not make it.

The Court also charged: the defendant insists that plaintiff could not recover the share of Edward M. Hines, on the ground that said ward resided in Meriwether county at the time of plaintiff's appointment as guardian, by the Ordinary

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of Harris county, and that said appointment was void ; now if you believe, from the evidence, that the said minor, Edward M., remained in Meriwether by the consent of the defendant, then you must find for the plaintiff.

The verdict was for plaintiff, and defendant excepted to the charges of the Court, and assigns the same as error.

INGRAM & RUSSEL; and J. M. MORLEY, for plaintiffs in error.

D. P. HILL, for defendant in error.

By the Court.—BENNING, J. delivering the opinion.

[1.] A father is bound to support and educate his children if he is able to do so, and that, whether they have property of their own or not. This proposition is not disputed.

The first charge, therefore, cannot be wrong, for it asserts no more than this proposition.

As to the second charge.

Hines, the father, was the person first appointed guardian of the children, by the Inferior Court of Harris county. He accepted the appointment, received the property, and otherwise acted as guardian, until he was removed from the guardianship, for misconduct, by that Court.

[2.] Now, would it have lain in his mouth to say, that at the time of his appointment one of the children "resided," not in Harris, but in Meriwether; and, that, consequently, the appointment was void? Would not the Court in Harris, have had the right to call him to account, be the matter as to the residence of this child, as it might? We think so. It is to be presumed, that he made every thing *appear* to the Court, necessary to give it the jurisdiction to appoint him; and allowing him afterwards to protect himself by a plea, that the Court did not have this jurisdiction, would be allowing him to take advantage of his own wrong.

If so, then, the act of appointing him is to be taken as the

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act of a Court having jurisdiction, and therefore is to be held as valid.

But if the Court had jurisdiction to appoint him, it had jurisdiction to remove him.

Not only so; it had jurisdiction to make any such order as it should "think fit;" and, therefore, it had jurisdiction to appoint a successor. "And when such Court shall know or be informed, that such guardian, executors or administrators, shall waste, or in any manner, mismanage the estate of such orphan or deceased person; or does not take due care of the education and maintenance of such orphan, according to his her or their circumstances; or where such guardian, executor or administrator, or his, her or their securities, are likely to become insolvent; such Court may make such order for the better managing and securing such estate, and educating and maintaining such orphan, as they shall think fit." *Cobb Dig.* 312

The result is, that all of the action of the Court in *Harris*; the appointment of Hines; his removal; and the appointment of Smith as his successor; was valid, at least, so far as he was concerned, even although, one of the children, was all the time, residing in Meriwether.

This being so, there was no harm done by this charge even if it was wrong; and if a wrong charge does no harm, it is not a ground to this Court for granting a new trial unless a new trial was moved for in the Court below.

In this case, a new trial was not moved for, in the Court below.

Judgment affirmed.

**SAMUEL J. HINCH, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.**

- [1.] The Act giving parties carrying causes to the Supreme Court thirty days to prepare and submit a bill of exceptions to the Judge who tried the cause, does not change the law in regard to the sentence of prisoners convicted of capital offences.
- [2.] On the trial of a prisoner for murder, who endeavors to make out a case of self-defence, it is competent to prove, on the part of the prosecution, that the prisoner was a large and deceased a small man.
- [3.] It is right for the Court, on trials for murder, when the accused relies on self defence as a justification, to enlighten the jury as to the law bearing upon that defence.
- [4.] The latter clause of the 15th section of the 6th division of the penal code, does not apply to cases of mutual combat, only, but to cases in which the accused declines a contest on equal terms, but shoots down his assailing adversary.

**Murder, from Muscogee county. Tried before Judge
WORRILL, May Term, 1858.**

The jury found Hinch guilty, and the Judge sentenced him to be executed on the second day of July, proximo. The defendant's counsel moved in arrest of judgment, upon the ground, that said defendant was ordered to be executed within thirty days from the adjournment of the Court; and also moved the Court for a new trial, upon the following grounds:

1st. Because the verdict of the jury, in said case, was contrary to law and evidence.

2d. Because the Court allowed the prosecution to prove the deceased a small man, and prisoner a large man.

3d. Because the Court erred, in charging the jury, after having charged all the grades of homicide, by reading the definitions from the code, "if a person kill another in his defence, it must appear that the danger was so urgent and pressing at the time of the killing, that in order to save his own life, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer had, really and in good faith en-

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deavored to decline any further struggle, before the mortal blow was given," and refused to charge the jury, upon request of counsel for prisoner, that said last section of the code applied to cases of mutal combats only; which said motion in arrest of judgment, and for a new trial were refused. Whereupon, counsel for prisoner excepted and assign error.

The ground in the motion for a new trial, that the verdict was contrary to the evidence, not being insisted on, it is deemed unnecessary to give a statement of the testimony.

RAMSEY & CARITHERS, for plaintiff in error.



OLIVER, Sol. Gen.; WELLBORN, JOHNSON & SLOAN; and C. J. WILLIAMS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] By law, the Court may fix any time for the execution of a prisoner convicted of a capital offence, between twenty and sixty days from the day of the sentence. *Cobb*, 840. The right conferred on parties to suits in the Circuit Courts, to have thirty days to draw up and submit to the Judge who heard the cause, a bill of exceptions, does not change or modify in any respect, the statute requiring the Court to fix the time for the execution of prisoners. The Court cannot fix the time within twenty days of the day of the sentence, and that gives time enough, if we were allowed to consider that matter in deciding the question.

The plaintiff in error moved for a new trial, on three distinct grounds. The first ground, "that the verdict of the jury in said case was contrary to law and evidence," was not insisted on in this Court.

[2.] The Court admitted evidence that the deceased was a small man, and the prisoner was a large man, and the ad-

mission of this evidence is urged as a ground for a new trial. From the proof submitted to the jury by the defendant, it is manifest that the counsel for the prisoner was attempting to make out a case of justifiable homicide, in self-defence. To make out this defence, it must appear that, the danger to the person killing "was so urgent and pressing, at the time of the killing, in order to save his own life, the killing of the other was absolutely necessary." If the prisoner might have prevented injury to himself without taking the life of the deceased, by reason of his superior size and strength, the killing was not absolutely necessary in order to save his own life. The evidence of one of the witnesses is, that he supposed the deceased, when he was approaching him, the witness, with an open knife, intended to cut him, but he stopped him. The testimony of another witness is, that when the deceased was going upon Stowers with his knife, the prisoner stopped him. He had strength enough to prevent an injury to others, without taking the life of the deceased. The evidence ought to have been admitted, to enable the jury to form a more satisfactory judgment upon the necessity of taking the life of the deceased.

[3.] We see nothing in the charge of the Court, or in his refusal to charge as requested, to warrant the granting of a new trial. A killing in self-defence was unquestionably attempted to be established by the prisoner, and the charge of the Court was, as it ought to have been, to enlighten the jury as to the law bearing upon that defence; to impress upon them, that it is not every danger to the person of the slayer which justifies the killing of another; but that it is a danger to his life so great, that in order to save his own life, *at the time of the killing*, the killing of the other was *absolutely necessary*.

[4.] We do not think that the last section of the charge, given from the code, applies to cases of mutual combat only. Mutual combats must be on sudden provocation, without malice, to reduce the homicide to manslaughter. On such

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occasions, the parties usually come to blows upon provocation. But if one party, in a slight assault, declines a contest on equal terms, and shoots the assailant down, is the offence to be mitigated to manslaughter? Or to be held to be justifiable homicide? He does not act or defend on the ground, that he feared the party killed, but on the ground of the absolute necessity of taking the life of the assailant, for the preservation of his own. The object of that part of the section to which the request refers, is to impress on the Court and jury, that the accused must have been without blame in the killing; that he declined a contest in the beginning, or after it had begun; that he was unwilling to enter into it; and that it was pressed upon him by the deceased, and that the killing was absolutely necessary to the preservation of his own life.

The last ground in the motion is, in effect, the same as the first, which was abandoned, that the jury found contrary to law and evidence, for if there was no evidence of malice, there could have been no finding of murder. But upon looking through the evidence, no one, we regret to say, can doubt of the existence of malice on the part of the plaintiff in error. If he had no particular malice against the deceased, there was no considerable provocation, and all the circumstances of the killing show an abandoned and malignant heart.

Judgment affirmed.

ROBERT S. HARDAWAY, plaintiff in error, vs. **EDWARD T. TAYLOR**, and **ALEXANDER LOWTHER**, defendants in error.

The presiding Judge has a discretion on the continuance of a cause; if he thinks it unjust to charge it to either party, he is not bound by law to do it.

Practice, from Muscogee county. Determined by Judge **WORRILL**, May Term, 1858.

On the trial of a claim case, counsel for plaintiff took exception to the execution, of a set of interrogatories offered by claimant, which the Court sustained, and a continuance was about to result. Whereupon plaintiff's counsel withdrew the objections; counsel for claimant objected to proceeding to trial, on the ground that the direct interrogatories were not fully answered.

The Court sustained the objection and held, that the case should be continued. Counsel for plaintiff insisted, that the claimant should be charged with the continuance. The Court refused and ruled that the case should be continued *generally*.

To which ruling plaintiff's counsel excepted, and assigns the same as error.

DOUGHERTY, for plaintiff in error.

WELLBORN, JOHNSON & SLOAN, for defendants in error.

By the Court.—**MCDONALD, J.** delivering the opinion.

The simple question in this case is whether the presiding judge was bound by law to charge the continuance of the cause to the party, whose interrogatories had not been fully answered.

It did not appear that it was the fault of the party, or of his counsel, that they were not fully answered. It was the fault of the commissioners who are officers of the law.

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On such questions, the presiding Judge must have and exercise a discretion to administer the law justly between the parties, and we have no doubt of its proper exercise in this case.

Judgment affirmed

SAMUEL H. HILL, plaintiff in error, vs. **JENNY MITCHELL**, defendant in error.

A contract by the Express Company for the transportation of mailable matter, over the usual mail route between cities in the United States, unless it be such matter as is excepted from the prohibitions in the Acts of Congress, is void, and the Company has no lien growing out of such contracts.

Trover and Bail, from Muscogee county. Tried before Judge WORRILL, May Term, 1858.

Certain packages were sent from San Francisco, California, to Jenny Mitchell in Columbus Georgia, by Freeman & Co's Express; Samuel H. Hill reported to Jenny Mitchell's agent that they were in his possession, as agent for Harden's Express Company, in Columbus, and he could have them, by paying the freight and insurance on them. Jenny Mitchell's agent refused to do this, and Hill refused to give them up, and this action was brought. On the trial of the case at the request of plaintiff's counsel the Court charged the jury:

That the packages conveyed from San Francisco to Columbus, were mailable matter, and their being conveyed over a postal route of the United States, was a fraud upon the post office laws, and that the defendant was not entitled to anything for such conveyance; to which defendant excepted.

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The defendant requested the Court to charge the jury, that if they believed from the evidence that the packages were the property of the plaintiff, that she had a right to convey them to Columbus, Georgia, from San Francisco California, in any manner she pleased, either through the post office or in any other manner.

The Court gave the charge with the qualification, that if the packages were conveyed over a post office route, that the defendants were not entitled to recover anything for freight and insurance; and that the contract was void; to which defendant excepted.

The defendant asked the Court to charge the jury, that the retaining of the property by the common carrier, until the freight was paid, was in law no conversion; which the Court charged with this qualification, that the contract for conveying these articles over a postal route of the United States, was void, and this being the case the retaining of the property, after demand, was a conversion; to which defendant excepted.

The defendant asked the Court to charge that if the contract for conveying these packages was a violation of the postal laws of the United States, the plaintiff is *particeps criminis*, and cannot take advantage of her own illegal act.

Which the Court refused and defendant excepted; and on these several exceptions assigns error.

B. A. THORNTON, for plaintiff in error.

R. J. MOSES by JOHN A. JONES, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

This is an action of trover, instituted for the recovery of certain California State bonds and deeds conveying land, which were sent by Harden's Express from San Francisco,

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in the State of California, to Columbus in this State over the usual mail route. They were transmitted by express without the authority of the defendant in error, who is the owner, and she refuses to pay the amount charged for their transportation, and the plaintiff in error refusing to deliver them without, this suit was brought for their recovery. The defendant in error insists, that the contract for their transportation, is an infraction of the postal laws of the United States, and that no freight or other charge can be demanded of her, and that the defendant in the Court below has no lien upon them for such freight or charge. If the bonds and deeds are mailable matter, and the Express Company is prohibited by law from transporting such mailable matter, then the contract, being in contravention of public law, is void, and the defendant can claim no right of any sort under it. The 9th section of the Act of Congress of the 3d March, 1845, declares it to be unlawful for any person or persons to establish any private Express or Expresses for the conveyance, or in any manner to cause to be conveyed, or to provide for the conveyance or transportation by regular trips or at stated periods or intervals from one city, town or other place, to any other city, town, or place in the United States, between and from and to which cities, towns, or other places the United States mail is regularly transported under the authority of the Post Office Department, of any letters or packets or packages of letters or *other matter* properly transmittible in the United States mail, except newspapers, pamphlets, magazines, and periodicals. A penalty of one hundred and fifty dollars is inflicted by the Act for its violation. *Brightly's Dig.* 767.

The same Act declares what shall be matter properly transmittible by mail. All letters and newspapers, all magazines and pamphlets periodically published, in regular series, or in successive numbers under the same title &c., and all other written or printed matter, whereof each copy or number shall not exceed eight ounces in weight, except bank notes sent in packages or bundles unaccompanied by written letters, are

declared to be such matter. Any packet or packets, of whatever size or weight, being made up of any such mailable matter, shall subject all persons concerned in transporting them to all the penalties of the Act, equally as if it or they were not so made up into a packet or packages. *Ib.* 768 and 769. By the same Act, books, magazines or pamphlets, or newspapers, not marked, directed, or intended for immediate distribution to subscribers, or others, but intended for sale as merchandize, and transported in the usual mode of transporting merchandize over the particular route used, and sent or consigned to some *bona fide* dealer or agent for the sale thereof are not within the prohibition. Books bound or unbound not weighing over four pounds are to be deemed mailable matter. *Ib.* 786. Were these bonds and deeds mailable matter? They were either written or printed matter, and each one does not exceed eight ounces in weight. It follows that they are mailable matter. If each bond or deed is under eight ounces in weight, the transportation of a packet of whatever size or weight, is prohibited under a penalty, and is unlawful.

The Act of Congress prohibits the establishment of a private Express for any such purpose and prohibits its under a penalty.

The business is unlawful, and contracts made with the persons who, in defiance of the law, carry it on, and in furtherance of that business, are unlawful and void. The object of the Government was to prevent effectually, all arrangements and practices by which the revenue of the Post Office Department might be cut off or impaired. The Acts of Congress are plain and intelligible and it would be well for those who incautiously violate them to look to it.

It is argued, that if the contract falls within the prohibition and is therefore void, that still the defendant is a common carrier and of course, has a lien in that character until charges are paid, and that his possession was legally acquired. If it be true that the possession was legally acquired, it

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is a possession for the true owner, and if he hold against the owner after a demand, it is a denial of the owner's right and a conversion. What right has he against the rightful owner, if he acquired that possession from a person who had neither power nor authority to deliver the possession? None at all. The rightful owner has a right to claim her property whenever she finds it, and because the person who has it is a common carrier, he cannot demand of her the discharge of a lien, which did not originate in any contract with her express or implied for the transportation. Suppose she did not desire the property sent?

But the contract for the transportation was illegal and void whether express or implied and in whatever form presented. It is equally a fraud on the postal laws, whether the packet was transported for one dollar or for five hundred, or if it was wholly gratuitous. No lien can attach in such case.

Judgment affirmed.

PETER McLAREN, plaintiff in error, vs. ELIZABETH LONG, adm'rx, &c., defendant in error.

[1.] In a case of deceit, the purchaser does not lose all right of action, by using the thing purchased, after he discovers the deceit, or even, after a tender back of the thing and a refusal to receive it.

[2.] In an action of deceit, if the property is of any value, that value must be allowed to the defendant, in the assessment of the damages.

Action on the case for deceit, in Muscogee county. Tried before Judge WORRILL, May Term, 1858.

McLaren vs. Long, adm'rx, &c.

Davis Long brought an action of deceit, against Peter McLaren, in which he alleged that McLaren had sold him an unsound negro as a sound negro, knowing the negro to be unsound; in another count he alleged that the said defendant and Milton S. Latham as defendant's agent, fraudulently colluded and sold said negro to plaintiff, as a sound negro, when he was unsound, and so known to be by McLaren. Afterwards, Long died, and his widow, Elizabeth, was made a party in his place. On the trial of the case the jury found for the plaintiff, and defendant by his counsel moved for a new trial on the following grounds:

Because the verdict was contrary to the evidence.

Because the verdict is manifestly against the weight of evidence.

Because the Court erred in refusing to charge the jury when requested to do so in writing, that if the proof showed that plaintiff after knowledge of the unsoundness of the slave, and after he tendered him back, and the defendant refused to accept him, used him as her own property, and still continues to do so, that the plaintiff cannot recover in this action.

Because the Court refused to charge as requested in writing, if the jury believe that plaintiff, after he knew of the unsoundness of the negro, retained him and hired him out two or three years, and still retains him in possession, that he cannot recover, although it appears that he first tendered him back to defendant, and defendant refused to receive him.

Because the Court charged the jury, that the measure of damages was the price for which the negro was purchased by the plaintiff, and the interest thereon; provided, the slave was tendered back in a reasonable time, after the discovery of the fraud, if any.

Because the Court allowed the bill of sale of Latham to be introduced in evidence in this suit, the said Latham not being a party thereto.

Brief of Evidence.

Nathaniel Nuckolls testified, he knew the negro; saw him a short time after his son-in-law, Long, bought him; looked dropsical; Long applied to Latham to take him back, and Latham refused, saying that McLaren would make the warranty good; McLaren himself acknowledged to agreeing to make the warranty good, but refused to take the negro back, when tendered to him by Long; Latham soon after left for California; was a young man and had no property. The negro is now in possession of the administratrix of Davis Long.

Dis. *Billing* and *Bozeman*, in connection with *Hoxey* and *Wildman*, on examination of said negro, testified, they believed him dropsical at the time of the purchase by plaintiff.

John R. Hull testified, the negro was a confirmed drunkard; McLaren sold the negro to Latham for \$600, and he was to stay in the store a few days until Latham could see if he could sell him. In a few days Long called to enquire of McLaren about the negro, defendant said he was a good for nothing drunken dog, and Long said if that was all the trouble he could manage him. Defendant gave the negro a very bad character for a drunkard, and more than Hull thought he deserved.

Nimrod Long and *Dr. Oliver Walton* testified by interrogatories. Long says, day after the purchase, Hull called on him to endorse a note made by Davis Long, his son, for the purchase of a negro belonging to defendant, as Hull said. Hull was a clerk in defendant's store; witness saw the negro a few days after, and thought he was unsound from his inability to do labor. Walton saw and examined the boy; thinks he had hydrothorax at the time of the purchase.

Milton S. Latham testified, by interrogatories; he purchased the negro of defendant and sold him to Long; made arrangement at the time that the negro should remain with defendant, and defendant to wait on him for the money until he could sell him; met Long a few days after, and they went

together to defendant's store, to see the negro; Long asked Latham, in the presence of defendant, if the negro was sound, and Latham replied, I don't know, but referred him to McLaren, who said yes, so far as he knew, except that he would get drunk when he got about liquor; and Long replied that if that was all he could manage that, when he got him to his plantation away from liquor; and Long agreed to give Latham his note for \$700, McLaren agreed to discount the note for his debt on Latham, which was done; there were no private interviews or collusions between Latham and defendant except as above stated. Defendant gave Latham a warranty bill of sale, and Latham released defendant without consideration, or without money being paid, on the first February, 1850. McLaren, the defendant, did not procure Latham to sell the negro for him; was not to give him anything to sell him at a given price. The bill of sale to Latham from defendant, dated 10 January, 1850, and release on the back to McLaren from Latham, dated the first February, 1851, was read in evidence.

Philo Wildman, examined the boy three times, at request of defendant. First time two or three months before the sale; second, a month after; and the third time, about six weeks after the sale. Two first times he thought him healthy, and the last he thought he had incipient dropsy. At the second examination, defendant told Wildman, Long had bought the negro from him; Wildman was a physician.

Latham testified, that so far as he knew, the whole transaction was fair on the part of all the parties.

The Court refused the motion for a new trial, whereupon defendant excepted and assigns error.

R. J. MOSES by JOHN A. JONES, for plaintiff in error.

JOHNSON & SLOAN; and DENTON, represented by SLOAN, for defendant in error.

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By the Court.—BENNING, J. delivering the opinion.

The two requests seem to go upon the assumption, that if Long used the negro as his own after his knowledge of the negro's unsoundness; and especially, if he used the negro as his own, after such knowledge and a tender back of the negro, and a refusal by Mr. McLaren to receive the negro, such using of the negro, amounts to an election to consider the negro as sound, and consequently, amounts to a waiver of all right of action in the case.

We do not think, that the law warrants such an assumption. No authority was referred to us in support of the assumption.

There was nothing, then, as we think, in the two grounds consisting of the refusals to charge these two requests.

The Court charged the jury, "that the measure of the damages was the price for which the negro was purchased by the plaintiff, and the interest, provided, the slave was tendered back in a reasonable time after the discovery of the fraud, if any."

This charge would perhaps be right, if Long had elected to *rescind* the contract and *sue for the original purchase money and interest*, as in that case, the parties would have been put *in statu quo*, which would give Long a right to have back his money and the interest on it, and, McLaren, (or Latham,) a right to have back his negro together with the negro's hire. But he did not do this. He sued in deceit—which was really claiming under the contract. The action of deceit, though itself *in tort*, grows out of contract. It is true, that there was evidence showing that an offer was made to return the slave, but it is also true, that there was evidence showing that this offer was refused, and, that Long after such refusal, used the negro instead of abandoning him, and brought suit, in deceit, instead of, in *assumpsit*. All of which taken together, shows, that although he offered to return the negro, yet that, when the offer was refused, he elected, not to re-

scind the contract, but to hold on to it, and rely upon the right to compensation for the deceit.

What then is it, that would have been the measure of this compensation? The purchase money and the interest thereon? Only in case the negro was utterly worthless. In that case, this might, perhaps, have been the measure of the damages, though, it may admit of a question, whether *interest, eo nomine*, can be given *in tort*. But, the negro was not utterly worthless. He was able to do "a half hand's work;" he hired for \$65, in 1854; when his health was last heard from, it had improved." "I think, however, that his health has improved, some," says, Dr. Walton speaking on the 11th of February, 1854.

[2.] We think, then, that the Court ought to have told the jury, that if they found against McLaren, they must allow him in the verdict, the value of the negro, and of his hire. And, therefore, we must grant a new trial.

This makes it unnecessary, to express an opinion on the ground insisting that the verdict was contrary to the evidence; still, as the question is made, we may say that we should find some difficulty in holding that the verdict is not against the weight of the evidence.

The only remaining ground of the motion, is, that the Court admitted to the jury, the bill of sale made by *Latham*, the suit being against McLaren. But the great question in the case was, whether or not, this bill of sale though signed by *Latham*, was not really the bill of sale of McLaren. *Long* insists, that *Latham*, in the sale of the negro, was merely acting for McLaren. Whether *Long* was right or not, was a question for the jury, and on that question, the bill of sale was certainly relevant—so, we see nothing wrong in its admission.

New trial ordered on the ground of the charge.

Bower vs. Douglass, adm'r.

ISAAC E. BOWER, plaintiff in error, vs, THOMAS L. DOUGLASS, adm'r., defendant in error.

- [1] To sustain a motion to dismiss, made by way of demurrer to the declaration, the motion will not be allowed, unless every material fact on which the motion is founded, is apparent in the declaration.
- [2] Evidence ought not to be admitted unless it be applicable to some issue made in the pleadings.
- [3] If a note be given for a balance on an account stated, the account thus settled cannot be pleaded as a set-off. The proper defence is one which makes an issue upon the settlement.
- [4.] After the dissolution of a partnership, one partner cannot bind another by a new contract.

Complaint, from Randolph county. Tried before Judge KIDDOO, May Term, 1858.

Kirksey and Bower were partners, and after they had dissolved, Kirksey converted an open account against the firm into a liquidated demand, by signing the name of the firm under seal to a note in favor of Hendrick & Hungerford. This note fell into the possession and control of Hendrick, who sued Kirksey and Bower upon it.

Upon the trial, defendant's counsel moved to dismiss said cause as to Bower, on the ground that it appeared, from the declaration, that the instrument sued on was under seal, and executed and delivered by only one member, in the name of the firm.

Which motion was overruled, and defendant, Bower, excepted.

Thereupon plaintiff put Kirksey on the stand, who testified that he and Bower had been partners, and that he executed and delivered the instrument sued on at the time it bore date, and that Bower was not present or assenting; that they dissolved partnership in the latter part of 1851. The note sued on bore date April 6th, 1853. That after dissolution with Bower, he went into partnership with Marlin before he made this note, and continued, under the new firm, to trade with Hendrick, and that this note was given in set -

Bower vs. Douglass, adm'r.

ement between the old firm of Kirksey & Bower, and of Hendrick and Hungerford.

Cross examined. He stated that at the time of the making of the note, Kirksey and Bower owed Hendrick & Hungerford nothing; that they owed them—K. and B.—upon a fair settlement, and that the balance was struck in favor of Hendrick and Hungerford by mistake, and said note given for it.

Plaintiff moved to strike out what Kirksey had said on cross examination, to which defendant objected. The Court sustained the motion, and defendant excepted. Defendant moved the Court to be allowed to amend and plead the amount due to Kirksey & Bower by Hendrick & Hungerford in off-set. Which the Court refused, and defendant excepted.

Defendant introduced Eugenius Douglass, who testified that he, as agent of Hendrick, to whom the assets of Hendrick and Hungerford had been turned over after dissolution, took the note which Kirksey made and delivered, and he knew the firm of Kirksey & Bower had been dissolved.

Breagan swore that the old firm of defendants was dissolved in December, 1851, and it was advertised and posted about Cuthbert; and Hendrick lived in and about Cuthbert all that time, and must have known it.

Defendants then requested the Court to charge the jury, in writing:

"That after dissolution, one partner cannot, by his separate acknowledgment, convert an open account into a liquidated demand so as to charge his former partner:

That after dissolution, one partner cannot, by his separate acknowledgment, convert an open account into a liquidated demand, so as to charge his former partner with interest:

That after dissolution, one partner cannot bind his former partner by a new contract, even though it be for an amount due by the partners before dissolution:

That after dissolution, one partner has no authority, from

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the mere fact that they had been partners, to charge his former partner by executing a sealed instrument in the name of the firm; and if so executed by one partner, it does not bind him who did not execute it, unless expressly authorized.

All which charges, as requested, the Court refused to give, but charged the jury, that if they believed the instrument sued on was given on a settlement of accounts between the old firms of Kirksey & Bower and Hendrick & Hungerford, they must find for the plaintiff; and that they had no right to consider any mistake that had been made in the settlement, or any of the evidence ruled out.

To all which refusals to charge, and the charge given, defendant excepted; and on the several exceptions herein contained, assigns error.

I. E. BOWER, for plaintiff in error.

DOUGLASS & DOUGLASS, for defendant in error.

By the Court.—McDONALD, J. delivering the opinion.

[1.] The motion to dismiss the case was made before any proofs were submitted to the Court and jury, and was predicated on what appeared in the declaration. The note is a sealed note, and is signed with the firm name, but it does not appear by whom it was signed, whether by Kirksey or Bower; nor does it appear in the declaration that both partners were not present, assenting to it. We are of the opinion of the presiding Judge in the Court below, that the cause ought not to have been dismissed.

[2.] If, when a party to a suit is introduced as a witness on the trial, the party introduced has a right to testify in the cause generally, beyond the point to which he is introduced; or if he cannot testify but in explanation thereof, the pleadings ought to be such as to make the evidence admissible under them. The defendant nowhere plead the non-existence

of an account due to the firm to which the note was given, by the firm giving the note. The defendant, Bower, pleads that it was given by Kirksey, his former partner, for his private debt, and that it was not given for any matter or thing within the scope of any partnership business, if any partnership ever existed. Independent of other considerations, the evidence was not admissible under the state of the pleadings. If the plea had set up such defence, the plaintiff might have been able to prove an account due by the defendants to the firm of Hendrick & Hungerford during the existence of both partnerships.

[3.] Under the facts disclosed in the record, we will not overrule the decision of the Court below refusing the motion to file a plea of set-off. The proper defence was a special plea, under our statute, setting forth the facts which were proven on the trial. If there were mutual accounts, they were settled by the giving of the note, and an account thus settled could not be pleaded as a set-off. Fraud or mistake in the settlement would have been a good defence to the note, to the extent that either could have been established.

[4.] The plaintiff in error submitted, in writing, several requests to the Court to charge the jury, amounting, in effect, to the same thing, that the defendant, Kirksey, had no right to bind Bower, after the dissolution of the partnership, by a new contract, even though the consideration be a debt due by the partners before dissolution. This point has been ruled by this Court, and upon the authority of that adjudication we hold, that the Court ought to have charged the jury as requested; that after the dissolution of the firm, one of the former partners cannot convert an open account, not bearing interest, into a liquidated demand bearing interest, so as to charge the other partner with a liability, with which he was not chargeable at the time of the dissolution. *Humphries vs. Chastain*, 5 Ga. 166.

Judgment reversed.

APPENDIX TO VOL. XXV.*

R. M. McLEOD et al., Trustees &c., vs. THE SAVANNAH, ALBANY AND GULF RAILROAD CO.

McDONALD, J. dissenting.

According to the complainant's bill, which is true for the purposes of this investigation, the plaintiffs, by a direct chain of title, from Joseph Hill down to themselves, stand in his stead as to all the rights which were granted to him by an Act of the General Assembly of Georgia, of June 26, in the year 1806, securing to him, his heirs and assigns, the exclusive right to build a bridge over the Ogechee river. If the grant, then, to Hill, vested in him such exclusive right, and in addition thereto, guaranteed to him, that on the performance by him, his heirs or assigns, of the conditions specified in the grant, no person or persons should, at any time, build any bridge or keep any ferry on the Ogechee river, within five miles, either above or below the said bridge, the Legislature, according to the construction placed on such grant, could not, by a subsequent Act, either directly or indirectly, invalidate or impair the terms on which that grant was accepted, without providing that compensation should be made them.

If Hill acquired such a title, a subsequent grant of the identical right, or of one which impaired its value, by admitting the construction of a bridge or the keeping a ferry within the prohibited limits, could not avail the grantee. It would

* This dissenting opinion of Judge McDONALD, being misplaced at the time the case was put to press, is inserted here. See the case reported, *ante*, p. 445.

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be void. I will examine the Act conferring on Joseph Hill the exclusive right to build the bridge or keep a ferry. The Legislature and Joseph Hill must be regarded as contracting parties, and the Act of the Legislature referred to, as the contract. The second section of the Act grants to Hill the exclusive privilege of erecting a bridge over the river, Great Ogechee, at or near the place where the ferry was then kept in the county of Chatham, but to this exclusive privilege is added no prohibitive stipulation preventing any person else from erecting a bridge or keeping a ferry within any specified distance of the point to which the exclusive privilege is affixed. But Hill was required to build the bridge in a complete and substantial manner, and capable of sustaining and passing all carriages in common use. The bridge was to be built within three years from the date of the Act; it was to be rebuilt when necessary, and Hill, his heirs and assigns were to keep the bridge in good and sufficient repair forever. Hill, his heirs and assigns, were to hold the same, and all emoluments arising therefrom. The exclusive privilege granted by the Act was to build a bridge at or near the place where the ferry was then kept in the county of Chatham. This was by the second section of the Act. Had the Act stopped here, there would have been an express grant of an exclusive privilege, from which would have been implied a restriction upon the Legislative power to make a subsequent grant of a privilege to another person to erect a like bridge at the same place. There would have been an express grant, and an implied prohibition of subsequent legislation. But as an Act of legislation merely, there could have been no express or implied restriction on the power of a subsequent Legislature. The Act must have amounted to a contract to have brought into operation and application, the clause of the Federal Constitution which prohibits the several States from passing laws impairing the obligation of contracts. The Act has all the elements of a contract about it. The second section may be construed as a covenant, that if Hill

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his heirs or assigns, would build a bridge over the river, and at the place mentioned, within the time specified, and of the description therein set forth, rebuild it when necessary, and keep it in repair forever, they should have all the emoluments arising therefrom, and the exclusive privilege of erecting such bridge at that place. This is a complete contract. The exclusive privilege, and the duration of the right are expressed on the one hand, and the consideration on the other. But in this contract, there is nothing in the letter, which would restrict the Legislature from granting a like privilege to another person to construct another bridge, not at or near the place specially designated, but so near it as to interfere seriously with the privilege previously granted, and to operate ruinously perhaps to the party induced by the prior grant to engage in the expensive enterprise. Whether this second grant would be a violation of the first, I will not discuss, as it is not, in my view, necessary to a decision of the point before the Court.

But for some reason, perhaps, from an apprehension on the part of the grantor, that Hill his heirs or assigns might be unwilling to engage in so costly an enterprise, without a provision effectually securing to them freedom from competition, within a limited distance, the Legislature in the fifth section enacted that it should not be lawful for any person or persons, at any time or times, to build any bridge or keep any ferry on the Ogeechee river, within five miles either above or below the said bridge. This was a supper-added covenant. It did not extend the right to Hill to select any point within the distance of ten miles on the river, within which he might build his bridge. His exclusive privilege as to place of building, and duration of right remained unaltered, and no additional exclusive privilege was given to him. This section of the Act makes it unlawful for *any* person, at *any* time, to build *any* bridge or keep *any* ferry within five miles, &c., &c. If the object of this section of the Act was to induce

Hill, his heirs or assigns, to undertake an enterprise, which they would not have undertaken without it, as guaranteeing to them all the emoluments that could reasonably be expected from travel of all sorts at that crossing, it is certainly a violation of the contract and an infringement of their rights, for any person, natural or artificial to build *any* bridge of any sort within the prohibited limits, by which their emoluments are diminished. The Legislature has made no grant which necessarily interferes with its prior grant, or from which can be inferred an intention on the part of the Legislature to interfere with its contract with Hill, his heirs or assigns. By an original Act and several amending Acts, it incorporated the Savannah, Albany and Gulf Railroad Company. By the original Act the Company was authorized to construct a Railroad between Savannah, or some point on the Central Railroad near Savannah, and Albany. None of the Acts designates a route. The location of their road is left entirely with the Company. If any right of the plaintiffs, therefore, has been infringed by the location, it has been by the voluntary act of the Company, under a very general power in their charter, and not by any special authority in the Act, and it seems to me to be unjust to say that the Legislature intended to grant a power to do an act in direct conflict with their prior grant. These grants are similar in their origin. The grant of the exclusive privilege of building the bridge, with a guaranty that no other bridge should be built within five miles above or below, had its foundation in public convenience. Nothing else could have justified the prohibition of the owners of the soil on each side of the river, for five miles above and below, from building bridges or erecting ferries on their own land. The grant of the charter to the defendants had its origin, in a more extensive public convenience. In each case there is an appropriation of the property of one person to another, or what is equivalent to it, and this appropriation, in each case, depends for its support on the same principle, viz: the power of a whole community to seize private property

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and apply it to its own use, whenever its convenience requires it, upon making compensation for it. Without pausing to question the propriety of extending this principle, in favor of persons natural or artificial, who project works for individual profit by which the public generally may benefited, I will remark that such extension of it is now so well established by repeated adjudications, that when a person acquires a right by this process, it is to be regarded as much an interest and property as if he held it by grant from the owner.

Hill, his heirs and assigns, in virtue of the section of the Act prohibiting any person at any time, from building any bridge within five miles above or below the one he had the exclusive privilege of erecting, had such a property in the river and its banks for that distance, as would render an entry thereon by any person for the purpose of constructing a bridge of any sort, an invasion of his rights of property. But it is said that Hill had the exclusive privilege of constructing a bridge capable of sustaining and passing carriages in common use; that railroads were not then thought of in this country; and he was not required to put up a structure capable of sustaining locomotives or cars, and that it must not be presumed that the Legislature intended to deprive itself of the power of engaging in or authorizing, such works for the greater public convenience as subsequent improvements in the mode of transportation or of traveling should establish as necessary to it; and that the grant to Hill being an exclusive grant must be construed strictly. I do not dispute a single position contended for. The grant to Hill, his heirs or assigns, is a grant to build a bridge capable of sustaining and passing carriages then in common use; and as his is a grant of an exclusive privilege, it cannot be construed that he has an exclusive right to build a railroad bridge, and to collect tolls from every train that passed. He has no such authority, and he and his heirs, or assigns, could not be supported in any such pretence. He cannot be required to put up such a bridge, because it is not his contract to do it.

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He was bound to erect and keep in repair the kind of bridge specified in the Act; but if he would do that, and he, his heirs and assigns, would keep it in repair forever, it should not be lawful for any person, at any time, to build *any* bridge, (not a bridge capable of sustaining and passing carriages in common use) but *any* bridge, within the distance specified in the Act. The object was to impress Hill, his heirs and assigns, with the strongest assurance, that the Legislature, the other contracting party, could express, that, if he or they would construct a bridge of the sort described in the second section of the Act, and keep it in repair forever, no bridge should ever be built within the prohibited limits, which could interfere with the emoluments to be derived from that costly work. The Act confers a perpetual right, and Hill his heirs and assigns, assume a perpetual obligation. There is nothing in the case of *Charles River Bridge vs. Warren Bridge*, in 11th Peters, which countenances the doctrine contended for in this case. There was no exclusive privilege there. There was nothing in the first charter prohibiting the construction of any bridge within a limited distance. On the contrary, the principle is there admitted, or is clearly to be extracted from the case, that where there is a grant of exclusive privilege by express words or necessary implication, it is inviolable. In granting a charter to the Central Railroad and Canal Company, the Legislature declared that it should "not be lawful for any other railroad or canal to be built, cut or constructed in any way or manner, or by any authority whatsoever, running laterally within twenty miles of the route adopted, unless by the said company, or with the consent of the Board, of Directors of said company." The exclusive right granted to this company is not unlike that granted to Hill, his heirs and assigns. The latter clause of the sentence quoted is altogether supererogatory, as the company itself might unquestionably have accepted a grant to itself, or might have waived the protection given to it in

the Act by consenting to a grant to other persons to construct a lateral road within twenty miles of its route.

But suppose the Legislature were to deem it proper to grant to another company the privilege of running another railroad within the prohibited distance, on the ground, that the public convenience absolutely demanded it. There is no constitutional obstacle. Every contract of the sort is made subject to that inherent power in the State as sovereign, to take private property for public use, by making compensation. A franchise is property, and may be seized for public purposes; for all private interests, according to principles now so repeatedly adjudicated as to be well established, must yield to what the Legislature considers a public necessity. But should the Legislature deem that a great supervening public necessity demanded an invasion of the chartered rights of the Central Railroad and Banking Company, can it be pretended that any Act for that purpose would be valid or binding which did not respect the rights of private property, and make it a condition that just compensation should be made for it? The Courts at least, would interpose, or ought to do so, in my judgment, until the party whose rights of property had been violated, was compensated.

I think, that by the Act of 1806, Hill, his heirs and assigns, had the exclusive privilege of building a bridge of the description specified in the Act, and at the place therein designated, and that no bridge of any sort interfering with the tolls of his bridge could be erected by any person within five miles of it, above or below.

It is further my opinion, that there is no express grant by the Legislature, of authority to the defendants to build their bridge within that prohibited distance, and that to construct it there, was their voluntary act, for which they are responsible; that the bridge and franchise of plaintiffs are property, and the interference with them is a trespass on individual right, which ought not to be permitted but on condition that compensation is made to the owner.

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I further believe, that the erection of a railroad bridge within the prohibited distance, is a violation of the rights of Hill, his heirs and assigns, under the Act which authorized them to construct and keep in repair the bridge and forbade the erection of any bridge within the specified limits, and that the quantum of damages sustained thereby, should be ascertained in the manner pointed out by law, in regard to other property, and should be paid by the defendants. The franchise granted to Hill is private property, and if taken for public use, compensation should be made. *West River Bridge vs. Dix*, 6 *Howard's Sup. Ct. Rep.* 507. I am therefore of opinion that the judgment of the Court below ought to be reversed.

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ADMINISTRATORS AND EXECUTORS.

1. To entitle an administrator to maintain trover against the vendee of his intestate's son and heir at law, it is not necessary to show an order of the Ordinary authorizing a sale of the slaves. *Reid vs. Butt, adm'r.* - 28
2. A purchases of B. a slave; C, the father of B, dies, and D, the administrator of C, brings an action of trover against A, to recover the negro, alleging that it was in the possession of his intestate at the time of his death, and he was the owner thereof.
Held, That the plaintiff was entitled to recover the whole property: *aliter*, if the defendant had made proof that there were no debts due by the estate; in that case the plaintiff could only recover the interest or share of the other distributee or distributees of the estate in the property. *Id.*
3. An order of Court appointing A. C. C. administrator on the estate of J. B. C., on his giving bond and security in \$1000, with a subsequent order granting A. C. C. leave to sell land as such administrator, is admissible to prove the administration. *Burkhalter vs. Ector.* - - - - - 65
4. It is not necessary to the validity of a claim to land at executors or administrators sale, that bond and security should be given. *Falls vs. Griffith, adm'r.* 72

4. The failure of the representatives of an estate to inventory and sell a portion of the property found in possession of their intestate, at his death, but claimed by a third person, ought not to prejudice the title of the estate; provided the circumstances were such as satisfactorily to account for the omission. *Walker vs. Walker, adm'r.* - - - - - 76

6. Heirs at law may, upon a special case made, as for instance upon a charge of collusion between the parties, institute suit over the head of the administrator, making him a party defendant in the case. It requires, however, a clear case, to justify this interference with the due course of administration, by the trustee appointed by the testator, or by the Ordinary. *McLendon et ux., et al., vs. Woodward et al.* - - - 252

7. F. intermarried with S., a widow, with several minor children. By the consent and counsel of the brothers of his wife, F. received at the same time a negro girl, which he sold, together with her infant child; with the understanding that the debts of the former husband were to be paid out of the proceeds and the children raised and supported. D. one of the brothers-in-law administered many years afterwards, on the estate of the former husband, and brought trover against F. for the negroes :

Held, That upon a bill filed, the administrator was bound to account for the debts and expenses of the estate and family; allow F. to retain his distributive share, and also to deduct the amount of certain demands paid out for one of the children, deceased. *Dorsett, adm'r. vs. Frith.* - - - - - 337

8. An administrator may retain a debt due to himself

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from his intestate, though the debt was barred by the statute of limitations, at the death of the intestate. *Baker et ux., et al., vs. Bush, adm'r.* - - 594

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ADVANCEMENTS.

A testator used this language in his will, "it is my will and desire, that at the division of my property, each one," (legatee,) "shall be charged with, and account for in said division, all money or property they have received from me, so as to make them share equally in the property to be divided, and in advances."

Held, That the legatees were bound to account for all money "received" by them, as much that received by them, as a loan, as that received by them, as an advancement. *Ex'or's of Nolan vs. Bolton et al.* - 352

AMENDMENTS.

1. Under the Act of 1854, complainant may amend his bill as matter of right at any stage of the cause, whether in matter of form or of substance. *Camp vs. Bancroft, Betts & Marshall.* - - 74

2. When the plaintiff in trover begins his petition thus: A. B. administrator &c. of &c. and tenders his letters as his authority to bring the action, if it be not a suit by him, as administrator, (as for myself, I hold it is,) it is clearly amendable, so as to make it such, by prefixing as often as may be necessary, the potent little monosyllable, *as*. *Laughter vs. Butt, adm'r.* - - 177

3. A suit brought in the name of a person to whom a note not negotiable has been passed, may be amended

by inserting the name of the payee for the use of such person. *Hayne, et al., vs. Perry.* - - 400

See *New Trial*, 5.

APPEALS.

1. It is in extreme cases only, that a jury should award twenty-five per cent, the maximum damages known to the law, for a frivolous appeal. *McMillan et al., vs. Lawrence et al.* - - - 189
2. The amount of damages to be assessed, in each case, is a question for the jury alone, uninfluenced by the opinion of the Court, touching the matter. *Id.*
3. In awarding damages, the jury need not be restricted to the particular facts of the case, but may look to the condition of the country, the price of property, the worth of money, &c., and then assess such a per cent as may seem to them reasonable and just, under all the circumstances, provided they are satisfied, that the appeal was frivolous and intended for delay only. *Id.*
4. An Attorney at law is not authorized to make the affidavit required by the Act of 1842, to entitle a party to appeal without the payment of costs or giving security. *Elder vs. Whitehead.* - - - 262
5. Persons who are cited in the Court of Ordinary, become parties to the proceeding, and when there is an appeal in that proceeding, they are carried up as parties to the appellate Court, though they may not be the actual appellants; consequently, it may happen, that the appeal will be good as to them, when it will not be good as to the actual appellants. *Warnock vs. Watson, et al.* - - - 467

ARBITRATION AND AWARD.

1. A case pending in Court, and referred to arbitrators, by agreement of the parties, comes under the XXXth section of the Judiciary Act of 1799, and not under the Arbitration Act of 1856; and in such a case, it is error in the Court to direct the award to be entered by the Clerk upon the minutes of the Court, without first hearing and determining the validity of the exceptions filed to the award.

The Act of 1856 applies only to cases originating out of Court. *Walker, ex'or, vs. Walker et al.* - 65

2. The minutes of arbitrators in a cause referred to them, cannot be made a part of the record of the cause. *Walker et al. vs. Walker ex'or.* - - - 257

3. A bill of exceptions (and bond and security given and cost paid) to the judgment of the Court, ordering an award of arbitrators *to be entered on the minutes of the Court*, does not suspend proceedings in the same, on a motion to make the award the judgment of the Court; the motions being distinct and independant of each other. *Id.*

4. An award is subject to be set aside, for a mistake in it, even though, the mistake may not be apparent on the face of it. *King vs. Armstrong.* - - 264

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ATTACHMENT.

A bond with security given to a plaintiff in attachment, by the defendant, with a condition to produce the property levied on at the day of sale, is not the bond requir-

ed by the 11th section of the Act of 1856. *Moody vs. Morgan.* - - - - - 381

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note, on the face of it joint and several, but signed by but one maker, who puts it in circulation, is good against him. *Dickerson vs. Burke.* - 225

2. It is to be presumed that a note transferred, was transferred before due, and that the holder is a *bona fide* holder for value, and in such case, the note itself is evidence of no notice of a defence except such as may appear on the face of it. *Id.*

3. The holder is not bound to prove that he gave value for it, unless it be first established that the note was lost or stolen. *Id.*

4. A. and B. give their note payable to C., for the hire of a negro for a particular year. The negro having been previously hired to another person, the note is returned to B., who, for a consideration, re-issues it to D.
Held, That the original note having become *functus* upon its re-delivery to one of the makers, on account of the failure of consideration, could not be re-issued by B., especially to one who had a knowledge of all the facts. *Mickelberry & Mobley vs. Shannon, adm'r.* 237,
5. In a suit on a promissory note, slight evidence that title to the note is in the plaintiff, will be sufficient to prevent a nonsuit. *Stamper, et al., vs. Hays.* - 546.
6. A receipt of payment, though not obtained fraudulently, yet, if obtained by mistake, or without consideration, does not bind. *Id.*
7. A purchaser, even with notice, from a purchaser without notice, is equally protected with the latter. *Id.*
8. If there are equities against a negotiable note, it is to be presumed that the transferee of it had notice of them, provided he became such transferee, when the note was overdue. *Williams & Co., vs. Nicholson.* - 560,
9. Where A. obtains advances from a bank to buy cotton, and it is understood that payment is to be made by giving drafts on the cotton, on the factors to whom it was to be forwarded :
Held, that the factors having failed, a tender of drafts upon said house, is no discharge of the original liability. *Johnson & Co., vs. The Mechanics and Savings Bank* - - - - - 643

BOND FOR TITLES.

1. A person who sells land, receives notes for the pur-

chase money, and gives a bond to make a title when the money is paid, on the death of the purchaser insolvent, is entitled to have the land sold and the proceeds applied to the payment of his debt, and the excess alone can be claimed by the creditors. *Strickland, adm'r, vs. Dent,* - - - - - 42

2. The vendor, in such case, cannot claim a ratable proportion of his debt estimated at the full amount, from the general assets of the estate, and then claim the land, as not having been paid for. The debt of which he has a right to claim a ratable payment, is the balance remaining after crediting the amount for which the land may have been sold. *Id.*

BRIDGE, FRANCHISE OF—AND WHEN INFRINGED, &c.

The Legislature, in 1806, authorized Joseph Hill to erect a toll bridge across the Great Ogechee, at a particular place; and the Act provides that it shall not be lawful for any one to erect any other bridge within five miles above or below. The toll bridge was built, and has been kept up ever since. In 1847 & 1851, the Legislature authorized the construction of a railway across the same river, between Savannah and Albany, which would necessarily cross near the first bridge, and which was actually carried across, within a mile and a half below the same;

Held, That the franchise granted to the Railroad Company was not the same as that conferred on the first grantee, nor so similar as to be deemed an infringement upon the prior charter, in the sense in which a new bridge or ferry interferes with one previously established at the same point; and that no injunction will be granted, nor compensation decreed, by way of damages in such case. *McDONALD, J. dissenting.*

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CERTIORARI.

1. The notice of a party, that he intends to apply for a writ of *certiorari*, to carry up to the Superior Court a decision of the Inferior Court, need not be accompanied, either by a copy of the bill of exceptions tendered to and overruled by the Inferior Court, nor of the petition for *certiorari*. *Johnston vs. Martin et al,* 268

2. A *certiorari* does not lie at the instance of the State to the Superior Courts, to obtain a rehearing in the Inferior Courts, against a slave, who has been acquitted for an alleged violation of the Acts of 1818, *Cobb* 992, or of 1835, *Cobb* 1008. *The State vs. Lavinia et al,* (slaves,) - - - - - 311

CHARGE OF THE COURT.

1. Charge to the jury that they might find according to the weight of probability, that which ever way they believed the weight of probability to be, they might find, is erroneous; the *evidence* should so preponderate in favor of the party for whom the verdict is rendered, as to satisfy the jury that he is entitled to it. *Parker vs. Johnson, adm'r,* - - - - - 576

2. P. sued M., and garnished A. & F., who answered, that they had made to M., their negotiable promissory note. This garnishment was served before the note fell due. Afterwards C. sued A. & F., (the makers,) on the note, who pleaded and proved the garnishment, the judgment thereon, and payment of the judgment; and asked the Court to charge the jury, that the *onus* was on C. to show that he obtained the note, before the service of the garnishment on them.

Held, That the Court erred in not so charging. French & Aven vs. Campbell, - - - - 600

See *Crim Law*, 13, 22, 23.

CLAIMS.

1. It is not necessary to the validity of a claim of land at executors or administrators sale, that bond and security should be given. *Falls vs. Griffith adm'r,* 72
2. A claim of a slave levied on to satisfy an execution issued from a Justices Court must be returned to the Superior or Inferior Court whichever may be first held. *Cottle vs. Dodson,* - - - - 633

COMMISSIONS.

An executor of an executor is entitled to commissions on pecuniary legacies paid out under the will of the first testator—commissions to be retained out of the fund due to the legatees; but he is not entitled to commissions from the estate of his immediate testator, on the hypothesis that the amount was due as a debt from his estate to the former estate, unless it appears that the last testator claimed the fund adversely to the legatees, under the first will. That the money and notes of the two estates were so commingled, that they could not be distinguished, makes no odds, if the deceased executor had charged himself with them, which he must be presumed to have done, if the contrary does not appear. *Jones ex'or, ex parte,* - - - - 414

CONSTITUTIONALITY OF LAWS.

1. The Act of 5th March, 1856, establishing a Criminal Court in the City of Atlanta, and authorizing a

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bill of indictment, in case of misdemeanors, to be found by nine Grand Jurors, not unconstitutional. *Thurman vs. The State*, - - - - - 230

CONTINUANCE.

1. The Solicitor General moved to continue, saying, that the State was not ready. The Court granted the motion.

Held, That as an abuse of discretion does not here affirmatively appear, this Court would not interfere with the judgment, if it *could*;—

And that, as it *could not* do so if it would, the case is one that it ought not to entertain. *Turner et al. vs. The State*, - - - - - 148

2. When the party resides out of the county, the attorney may make the showing for a continuance, provided for by the 35th rule of Court. The case is the same, when the privy liable over to the party, resides out of the county, if it is he that defends the suit. *Christian vs. Mansfield*, - - - - - 698

3. Presiding Judge has a discretion in the continuance of a cause, and if he thinks it unjust to charge it to either party, he is not bound by law to do it. *Hardaway vs. Taylor & Lowther*, - - - - - 703

See *Crim. Law* 28.

CONTRACT.

1. The rule that words spoken before and at the making of a written contract merge in the contract, does not apply when the words spoken themselves constitute a contract, the parties to which, are not the same as the parties to the written contract. *Ford vs Smith*, 675

2. When a contract has been repudiated by both of the parties to it, it ceases to be the criterion for measuring the rights and liabilities between the parties to it. *Id.*
3. Even when the work has not been done according to the contract, yet if received, and of benefit to the party receiving it, he shall pay for it a sum equal to the value of the labor and materials. *Id.*

See Mailable Matter.

CORPORATIONS.

1. Certain persons associated and drew up a declaration and recorded it, agreeably to the Act of 1847, authorizing persons to prosecute the business of manufacturing with corporate powers and privileges, and assumed the name of the Madison Steam Mill Company. On the 11th of February 1854, the Legislature passed an Act granting corporate powers and privileges to the Madison Steam Mill Company, recognizing it as a body corporate and politic, declaring among other things that it should have, possess and enjoy all the franchises which were then held by the said company.

Held, That these two Acts so far as they are consistent with each other make the charter of the company.
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2. The acceptance of the new Act did not destroy the old organization. *Id.*
3. If an agent of a corporation have authority to convey or mortgage, and affixes thereto anything which the law recognizes as a seal when affixed by a natural person, it will be a good execution presumptively by the corporation. *Id.*

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COSTS.

1. The Superior Court may order its Clerk to revise and review a judgment for costs, and order them to be re-taxed. *McGuire et al. vs. Johnson*, - - - 604
2. A party cast in the Supreme Court liable for the costs in that Court; and if he eventually succeed in his cause in the Superior Court, he cannot recover them. *Id.*

CRIMINAL LAW.

1. The possession and occupancy of a house by a person, as a dwelling house, is sufficient evidence of ownership thereof in that person, to support an allegation in an indictment for larceny from the house, that the prisoner entered the dwelling house of that person. *Markham vs. The State*, - - - 53
2. When there is no evidence that a boarder hired a particular room to lodge in, it is not error in the Court to refuse to charge the jury, that the indictment ought to have charged the offense to have been committed in the hired lodgings of a boarder. *Id.*
3. The 18th section of the 14th Division of the Penal Code, authorizes a demand for trial, to be made at the first, or at the second Term, but not afterwards. *Price vs. The State*, - - - 133
4. Provocation by threats will not be sufficient to reduce the crime from murder to manslaughter, where the person killed is unarmed, and neither making or attempting any violence upon the prisoner, at the time of the killing. *Hawkins vs. The State*, - - - 207
5. If sufficient time has elapsed for reason to resume her sway, the killing will be attributed to deliberate revenge, and punished as murder. *Id.*

6. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. *Id.*

7. If the indictment omits to specify the crime with which the defendant is intended to be charged, the defect is fatal. *The State vs. Woodley,* - - 235

8. The offence of being an accessory before the fact in murder, is one that may be committed by a slave; and one which, if committed by a slave, is to be punished with death. *Thornton (a slave) vs. The State,* - 301

9. A slave convicted of murder, but not sentenced, is a competent witness for the State, on the trial of another slave indicted as accessory before the fact in the murder. *Id.*

10. There was a fight between two persons. They were separated. Thirty minutes afterwards, whilst one of them was undergoing an examination, as to his wounds, with his pantaloons down, he was attacked by the other.

Held, that the two fights were distinct, and that the first made no part of the second; and therefore, that on an indictment for the second, evidence of the first was not admissible. *Whilden vs. The State.* - - 396

11. On an indictment for stabbing, the jury may find a verdict of guilty of an assault and battery. *Id.*

12. An indictment charging the accused with the offence of trading with a slave without written permission from his owner, &c., need not charge the name of the owner or the slave, nor the ownership of the property traded. *Stringfield vs. The State,* - 474

13. If the Court charge the jury in a criminal cause,

that if they believe that one of two or more acts, necessary to constitute the offence charged in the bill of indictment be proven, they should find the defendant guilty, it is error. *McLeland vs. The State*, - 477

14. When two persons are indicted together, and a true bill found against both, but one only is arrested, arraigned, and put upon his trial, a general verdict, "We the jury find the defendant guilty," is sufficiently certain as to the individual intended. *Martin vs. The State*, - - - - - 494

15. A juror who, while consulting with his fellow-jurors in a criminal case, refers to another offense, alleged to have been committed by the defendant, saying "he is a bad man any how," and especially if he acknowledges that this other imputed crime influenced the jury in convicting the accused, evinces a bias of mind that disqualifies him from serving as a juror. *Id.*

16. The rule stated, as to the taking down of testimony in cases of felony; and the use to be made of the same. *Conner vs. The State*, - - - - - 515

17. An indictment or presentment good, although an impossible day be stated, as that on which the offense was committed. At any rate, the objection comes too late after verdict. *Id.*

18. If jurors, to constitute a panel in a criminal case, be summoned by bailiffs, it is good. *Id.*

19. Where the witness in a criminal case, is unable, from his physical condition, to speak audibly, his answers may be communicated in his presence and hearing by a sworn officer of the Court. *Id.*

20. Although the crime of larceny may be complete as

to two persons, as much so as though no other was concerned, still another may be a principal in the same offense. *Id.*

21. When an escape by the prisoner is put in evidence by the State to raise the presumption of conscious guilt, it is competent for the prisoner to rebut it by showing that it was attributable to the fear of serious personal injury from the friends of the deceased, and not from a consciousness of guilt. *Golden vs. The State*, - - - - - 527

22. It is not error in the Judge to say I "apprehend" the rule of law to be this. It being synonymous with understand, conceive, believe. *Id.*

23. To tell the jury, after charging the law in a criminal case, that they should not differ from the Court on slight or trivial grounds, but should be "clearly satisfied" that the Court was *wrong* before they did so, is objectionable. *Id.*

24. One may kill another against whom he entertains malice, and yet not be guilty of murder. *Id.*

25. There can be no murder without malice, express or implied.

A homicide may be reduced to manslaughter where no actual assault has been committed on the person of the defendant; and where no attempt has been made to commit a serious personal injury upon the accused. *Id.*

26. Drunkenness cannot excuse crime; modern decisions go so far as to hold that drunkenness may be considered on the question whether the prisoner was excited by passion or actuated by malice, in committing a homicide. *Id.*

27. To justify taking human life, the law makes no discrimination in favor of a *drunkard* or a *coward*, or any particular individual; but the circumstances must be such as to justify the fears of a *reasonable man*. *Id.*

28. Where there are cross indictments, the acquittal of the defendant who is the prosecutor in the case about to be tried, is no ground for a continuance; nor is the fact, that the prosecutor is a member of an influential family, and of the party in the majority, and politics to some extent was mixed up with the trial which had taken place, and had given rise to excitement. *Galloway vs. The State*, - - - - - 596

29. Error cannot be assigned on the conclusion of fact of the presiding Judge acting as trior. *Id.*

30. In cases on the criminal side of the Court, in which defendants are entitled to a trial on demand, the presiding Judge cannot order a mistrial but for providential cause &c., without the consent of the defendant. *Geiger vs. The State*. - - - - - 667

31. An indictment concludes properly, if it follows the form prescribed by the statute. *Camp vs. The State*, 689

32. Manslaughter may be committed by killing a slave. *Id.*

33. That a bill of indictment for manslaughter, charges facts in the body of it, which constitute murder, is no ground for arresting the judgment. *Id.*

34. It is not necessary for the jury to incorporate in their finding the definition of the offense charged in the indictment. *Id.*

35. The Act giving parties carrying causes to the Supreme Court thirty days to prepare and submit a bill of

exceptions to the Judge who tried the cause, does not change the law in regard to the sentence of prisoners convicted of capital offences. *Hinch vs. The State*, 699

36. On the trial of a prisoner for murder, who endeavors to make out a case of self-defense, it is competent to prove, on the part of the prosecution, that the prisoner was a large, and deceased a small man. *Id.*

37. It is right for the Court, on trials for murder, when the accused relies on self-defense as a justification, to enlighten the jury as to the law bearing upon that defense. *Id.*

38. The latter clause of the 15th section of the 4th division of the Penal Code, does not apply to cases of mutual combat, only, but to cases in which the accused declines a contest on equal terms, but shoots down his assailing adversary. *Id.*

See *Constitutionality of Laws*.

See *Evidence*, 4.

DAMAGES.

1. "Speculative damages" are not recoverable. *Red vs. The City Council of Augusta*, - - - 356

2. In an action of trover, to recover for the conversion of slaves, which have been sold by defendant and cannot be delivered, the purchase money with interest thereon, is a proper criterion of damages, provided the sale has been fair. *Dorsett, adm'r, vs. Frick*, - 537

See *Appeals*, 1, 2, 3.

See *Deceit*, 2.

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DECEIT.

1. In a case of deceit the purchaser does not lose all right of action, by using the thing purchased, after he discovers the deceit; or even, after a tender back of the thing and a refusal to receive it. *McLaren vs. Long, adm'r*, 708
2. In an action of deceit, if the property is of any value, that value must be allowed to the defendant, in the assessment of the damages. *Id.*

DEEDS OF GIFT—OF SLAVES.

1. A deed of gift of a slave, if made and recorded according to the provisions of the Act of 1838, "to prescribe the mode of making gifts of slaves," is good against subsequent purchasers from the donor. *Pyron vs. Parker*, 17
2. Where it turns out, upon the trial of a cause, that a paper purporting to be a deed of gift of certain slaves not specified, has been in existence and destroyed by the donor, no advantage can be taken of the instrument; nor can any presumptions be made to the prejudice of the party making it, unless it be first made to appear that the paper had been executed and delivered; and that the negroes in dispute were included in it. *Reid vs. Butt adm'r*, 28

DEMAND FOR TRIAL.

See *Crim. Law*, 3, 30.

DISTRIBUTION OF ESTATES.

1. Grand children cannot take in a will, under a bequest to children, unless there be something in the will

to indicate and effectuate such intention by the testator.

Walker et al. ex'ors vs. Williamson et al., - - 549

2. Nothing would pass to a son of a testator, under a bequest to his children, who died in the lifetime of the testator. *Id.*

3. Where there is a power of appointment, the execution of the power must fail, before the property, the subject of the appointment, can be distributed. *Id.*

4. Children of a testator's children who died before the making of the will, take under a bequest to his children, living at the time the estate is to be divided, and their representatives, if they should be dead. *Id.*

5. If there be an intestacy in regard to any part of a testator's estate, the executors shall hold it in trust for the benefit of the next of kin of testator. *Id.*

6. A son, in life at the time of the making of the will, but who dies in the lifetime of the testator, does not answer the description of children, to whom the property is given. *Id.*

7. Legatees are not to account for property as advancements given to them in a will, in the distribution of a part of the testator's estate not disposed of by the will. *Id.*

8. An illegitimate child fully legitimated by an Act of the Legislature, passed by the procurement of the putative father, becomes his lawful child, and such child and his lawful children, upon the death of either, in-

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testate, inherit from each other. *Shelton et al. vs. Wright, adm'r*, - - - - - 636

See Adm'rs and Ex'ors, 7.

See Husband and wife.

DIVORCE—ALIMONY—COUNSEL FEES.

1. Where the husband and wife separate by agreement, and she takes back as her separate estate, the property which she brought into the marriage, and subsequently, the husband sues for a total divorce, no further allowance will be made to the wife, for her maintenance during the pending of the libel; the Court, however, will, upon application, compel the husband to advance to the wife, money enough to cover the expense of defending the litigation. *Killiam vs. Killiam*, - 133
2. A Court has no jurisdiction over a case in which neither of the parties is, or has ever been, in the State, or is a citizen, or a resident of the State, or the owner of property in the State. *House vs. House*, - - 473

DOMICIL.

A man residing in Rome, wounded another, and fled into Alabama, leaving his wife behind him, who continued residing where they had been residing, when he fled. In the course of a few months, he was sued, and copies of the writs were left for him, with his wife, at the place at which he was residing when he fled. *Held*, that there was not enough in this to show that he had changed his domicile at Rome for any other domicile; and, therefore, that the writs were well served. *Barrett & Williford et al. vs. Bluck, Cobb & Co.*, - 151

DRUNKENNESS.

See *Crim. Law*, 26, 27.

EJECTMENT.

1. In ejectment the plaintiff read in evidence a grant to Larey J. Simmons; he then offered a deed from Lacey J. Simmons.

Held, that this deed, though not following the grant, was admissible under the Act of 1802, prohibiting the Superior Courts from withholding "any grant, deed, or other document from the jury." *Simmons et al. vs. Lane*, - - - - - 178

2. A writing, to serve as a color of title, must, at least, not be one in which the writer disclaims title in himself, and admits title in another. *Id.*

3. When a man who has been holding land, without a title to it, voluntarily abandons it, the presumption is, that he has not been holding it adversely, but in subordination to the title of the true owner; and, therefore, he can not insist upon such possession, to make out title in him, under the statute of limitations. *Russell vs. Slaton*, - - - - - 193

4. Where the defendant in ejectment takes another person on the land in dispute, rents him the premises, and after nailing up the cabin, the only building on the place, they retire together, charging the witness not to disclose the transaction; is the possession changed? *Quere?* Clearly it is not, if the whole affair be colorable only, and intended to avoid a suit at the instance of the plaintiff against the defendant as tenant in possession. *Oliver et al. vs. Williams*, - - - 217

EQUITY.

1. A lot of land is sold under a proclamation by the

Sheriff that it is sold to pay the purchase money, which is understood by the by-standers to mean, to satisfy the vendor's lien, and it is so meant by the Sheriff, and it turns out to be a mistake—no deed having been executed and filed, in compliance with the statute :

Held, that the sale will be rescinded at the instance of the bidder, and a re-sale ordered. *Horton & Rikeman vs. Moyers*, - - - - - 89

2. A bill, showing that the land, the subject of the suit, is owned by several tenants in common, some of whom are alleged to have made valuable improvements on parts of it, and showing other equities *prima facie*, against the defendants, is not without equity, and to be retained for a hearing. *Jackson et al. vs. Jones et al.*, - - - - - 93

3. When there is an adequate remedy at law, equity will not interfere. *McLeroy vs. McLeroy*, - - - 100

4. A demand for \$28 is not beneath the dignity of a Court of Equity in Georgia. *North vs. Ashcraft et al.*, - - - - - 132

5. To entitle a complainant in equity to relief on the ground of fraud, there must be damage as well as fraud. *Bigby vs. Powell, adm'r.*, - - - 244

6. It is no ground of equity that counsel misrepresented the contents of a bill of exceptions to the Judge for his certificate or signature, or to the counsel of the opposite party for his acknowledgment of service. In such cases, it is always at hand and ought to be read. *Id.*

7. A complainant seeking relief, cannot rely on a mere *obiter* of the Court during the progress of an argument before it, as settling the law, nor of a declaration by a member of the Court of what would have

been the decision of the Court under a different state of facts, which would have been presented had he not been entrapped by representations of opposite counsel, as entitling him to an equity, when there is none without it, and the declaration is not sustained by the law. *Id.*

2. The omission of a palpable duty ought never to be allowed as a ground of equity. *Id.*

EQUITY PLEADING AND PRACTICE.

1. A plaintiff in Equity being allowed by the Court to dismiss his bill without prejudice, may move to re-instate his cause. *Warner vs. Graves, et al.* - 369

2. The cause should be re-instated in Court if the necessity for its dismissal was superinduced by the error of the Court. *Id.*

3. When the bill seeks to set aside a deed, and prays that the defendant may be compelled to produce it in Court, and deliver it up to be cancelled, and the plaintiff annexes a copy to his bill, which defendants admit to be a true copy, and the defendants, moreover, file a cross bill, and attach a copy of the same deed as an exhibit, the Court, on motion of plaintiff, may and ought to compel the defendants, at the hearing, to produce the original deed, to be read in evidence. *Id.*

4. Persons interested in the subject matter of a suit in Chancery, ought to be made parties. Our statute makes an exception in suits for the distribution of estates, but it makes no other innovation on the rule. *Elam et al vs. Garrard.* - - - - - 557

5. It may be to the interest of one of two joint makers of

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a note, that the note should not be set aside by the other. When it is, he is a proper party *defendant* to a bill by the other, to set aside the note. *Williams & Co., vs. Nicholson.* - - - - - 560

6. No error for the Court to allow a complainant to rescind an order, to amend the bill, passed on his own application and for his own benefit, the bill having not been amended. *Brooks vs. Colby, adm'r, &c.* - 634

EVIDENCE.

1. A witness who has been the owner of mills for 25 or 30 years, may be admitted to give his opinion as to the capacity of a person as a millwright, judging from the fact that his work did not answer the purpose intended. *Doster vs. Brown.* - - - - - 24

2. The Acts of Congress of 1790 and 1804, prescribing the mode for making the Acts of the Legislature, records, judicial proceedings and exemplifications of office books, in one State, evidence in another, does not abrogate the common law method of proving these documents, but is merely cumulative. *Goodwyn vs. Goodwyn.* - - - - - 203

3. The Courts in this State have no right to require the production of are original execution from another State. An examined copy, proven in the mode prescribed by law is sufficient. *Id.*

4. On a trial for murder, it is not competent, in order to reduce the homicide to manslaughter, to ask a witness if, from the conduct, countenance and language of the deceased, he did not believe it was his intention to kill the prisoner? The witnesses must testify to facts, and not give their opinion. *Hawkins vs. The State.* - 207

5. A tax execution levied on tract of land No. 224 in the 5th district of Carroll, is no evidence to support a sale of the same number in the 3d district, and is inadmissible for that purpose. *Dickerson vs. Burke.* 225
6. The marks on bales of cotton is no evidence of the contract between the parties; they are mere directions to the carrier as to the place of ultimate destination. *Rome Railroad Co., vs. Sullivan, Cabot & Co.* - 226
7. A witness is competent to testify, who has no certain interest in the event of the suit, and where the judgment in the case cannot be given in evidence, either for or against him, in a subsequent suit against himself. *Edwards vs. McKinnon.* - - - 337
8. "The oath of the party, stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody," is a sufficient foundation for the introduction of a second copy of such original. *Poulet and Wife vs. Johnson, et al.* - 403
9. Verbal admissions are legal evidence, to prove a trust resulting by implication of law. *Id.*
10. Where the admission or exclusion of certain testimony cannot affect the real merits of the case, and no new trial is asked, the Judgment of the Court below will not be reversed on account of any error as to the competency of said proof. *Churchill et al., vs. Cor-ker, adm'r.* - - - - - 479
11. The Act prohibiting attorneys from testifying in certain cases, (*Cobb*, 280,) does not apply, where the facts to which the evidence refers, occurred in another case. *Id.*
12. It is not necessary in this State, that any will, wheth-

er of real or personal property, should be re-proven when offered in evidence, in any Court in Georgia, as a muniment of title, but a certified copy of the probate, from the Ordinary, under the seal of that Court, makes it testimony.

Recitals in the judgments of the Courts of Ordinary, stand upon the same footing as the judgments of all other Courts of general jurisdiction. *Id.*

13. A purchaser with warranty, finding a third person in possession of the land, sued him for the land; of that suit, his warraptor had notice; judgment went against the purchaser. Afterwards, he sued the warrantor on the warranty and relied on this judgment to show a breach of the warranty.

Held, That the judgment was *prima facie* evidence of such breach. *Gragg vs. Richardson.* - - - 566

14. Record of a cause between other parties admitted to prove that there was a judgment. *Chance vs. Summerford.* - - - - - 662

15. Evidence admissible to prove that such judgment was paid, and by whom it was paid. *Id.*

16. Note sued on no part of the record of the judgment obtained thereon; and if a copy be admitted in evidence without objection, it may be considered by the jury. *Id.*

17. Evidence ought not to be admitted unless it be applicable to some issue made in the pleadings. *Bower vs. Douglass, adm'r.* - - - - - 714

18. Books kept by the party himself, having no clerk, with

alterations and erasures of amounts, are not admissible in evidence. *Doster vs. Brown.*

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See *Adm'rs and Estors.* 3.

See *Criminal Law*, 10, 21.

See *Grants* 1.

EXEMPTION LAWS—CONSTRUCTION OF,

1. Under the Act exempting house and lot not exceeding a certain value in a city or town from levy and sale in payment of debts, and a house and lot of greater value being owned by the debtor, a sale may be made, and a sum of money may be allowed the debtor from the proceeds of sale, equal in amount to the specified value of property exempted by the Act from sale, as an equitable mode of partitioning. *Dearing vs. Thomas.* 223
2. The removal of the defendant from the house and lot, does not subject it to the payment of a debt, if it be otherwise exempt. *Id.*

FACTORS.

A factor who has given or extended credit to a customer on the credit of shipments made to him, and property in his possession supposed to be his, and he subsequently received notice that the property, or a considerable part of it, is not his, which he finds to be true on enquiry, and his customer insolvent or probably so without the property ascertained not to be his, may proceed at once, upon his own judgment, to take the usual steps for his own security. *Cummins vs. Boston & Gunby.* 277

See *Bills of Exchange and Prom. Notes*, 2.

FIXTURES.

As a general rule, when an article can be removed without essential injury to the freehold, or the article itself, it is a chattel, and not a fixture. This criterion, as to what is or is not a, fixture, is subject to qualification, and may be controlled by the agreement of the parties, or established custom and usage. *Wade, ex'or, vs. Johnston.* - - - - - 331

FRAUDULENT CONVEYANCES.

A vendor making an absolute deed to land, and continuing in possession until subsequent debts are contracted; such occupation of the property is a badge of fraud, as against after creditors, notwithstanding the old debts existing at the time of the sale, may have been discharged. *Smith vs. McDonald.* - - - 377

FRAUDS—STATUTE OF.

1. So long as the buyer continues to have a right to object either to the quantum or the quality of the goods, there has been no acceptance and receipt within the meaning of the statute. *Lloyd & Pulliam vs. Wright, Griffith & Co.* - - - - - 215

2. Charles A. Williams bought of S. D. Linton & Co., 100 barrels of flour, at \$5.50 per barrel. The following note or memorandum of the contract was executed by S. D. Linton & Co., through their agent, Mead, and delivered to the agent of Williams.

"C. A. WILLIAMS,

To S. D. LINTON & Co.,

Dr.

To 100 barrels of Sup. Flour, at \$5.50, ~~\$550.00~~

To be delivered at any time during the winter when wanted, from this date. Augusta, September, '53.

S. D. LINTON & CO.

Per MEAD."

On the 31st of January, 1854, Williams called on Linton, tendered in gold the \$550.00, and demanded the hundred barrels of flour, which were refused to be delivered. The value of flour at Augusta, during the winter of 1854, was proven.

Held, That the contract was not within the statute of frauds, but was sufficiently valid to authorize a recovery in damages thereon, for the breach thereof. *Linton & Co., vs. Williams.*

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FREE PERSONS OF COLOR.

A free person of color is capable, by the laws of Georgia of acquiring and holding real estate, except in the cities of Savannah, Augusta and Darien. *Beall vs. Drane et al., ex'ors.*

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GAMING.

1. An action, (set-off,) to recover back money lost at cards, founded on the Act of 1764, against lotteries and gaming is not one of the actions for the not bringing of which the non-residence of the parties subject to them, is made an excuse by the limitation Act of 1806, or that of 1839. *Cook vs. Barnett.*

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2. In such an action, the winner is compellable to discover the gaming, under the discovery Act of 1847, and the Acts amendatory of that Act. *Id.*

GARNISHMENT.

1. Stock in the Eatonton Branch Railroad, is not subject to garnishment, at the instance of creditors of the stockholders. *Ross vs. Ross et al*, - - - 297
2. The Act of 1845, (*Cobb*, 88,) exempting journeymen mechanics and laborers from the process and liabilities of garnishment on their daily, weekly or monthly wages, is not repealed by the attachment and garnishment Act of 1856, and extends to overseers who, by agreement with their employers, are to be paid their wages daily or weekly, to enable them to supply the necessities of life to their families. *Caraker vs. Matthews et al*, - - - - - 571
3. The Act of 1845, exempting the daily, weekly, or monthly wages, of journeymen mechanics and day laborers, from garnishment, is not repealed by the repealing section of the general attachment Act of 1856. *Russell vs. Arnold*, - - - - - 625

See *Charge of the Court*, 2

GIFT, MORTIS CAUSA.

1. To complete a gift, *mortis causa*, there must be a delivery of the thing given. *McKenzie vs. Downing*, 669

GRANTS.

1. A grant was to "Berry Stephens, orphan." There was no person of that name, but there was a person who was the orphan of Berry Stephens. *Held*, that parol evidence was admissible, to show him the person meant. *Walker, Guardian vs. Wells*, - - - 141
2. A grant from the State, cannot be set aside in any proceeding, to which the State is not a party. *Parker vs. Hughes*, - - - - - 374

3. And the State, by the Governor, cannot be made a party complainant, without the Governor's consent. *Id.*

GUARDIAN AND WARD.

1. A non-resident guardian may sue in the Courts of this State. *Sims, Ord'y, vs. Renwick et al.* 58
2. If a ward attain the age of 21, during the pendency of the suit, he may be substituted as party plaintiff in lieu of his guardian, and if he amend his declaration without leave of the Court, or an order of Court, it is no ground to dismiss the action, if he be prepared to make proof of his majority when objection is made. The Court ought to direct the order to be made, now for then. *Id.*
3. A person who has been appointed guardian, by a Court of Ordinary, and has taken possession of the property, and otherwise acted as such guardian, is concluded from saying when sued as such guardian, that the ward did not reside in the county of the Court, and therefore, that the Court had no jurisdiction to make the appointment. *Hines & Bryan vs. Mullins, Ordinary,* 626

HUSBAND AND WIFE.

A wife being entitled to a legacy, dies before the husband reduces it to possession, and the husband who survives his wife twelve months, dies without administering on her estate. A stranger administers on the wife's estate.

Held, that the wife's estate vested in her husband, and that when her administrator receives it, he shall hold it in trust for the next of kin of the husband or his leg-
 atees. *Bryan, ex'or., &c., vs Rooks, adm'r., &c.,* 628

ILLEGAL CONTRACTS.

1. In an application to the Legislature for a pardon, it is not illegal to use an authenticated copy of the evidence taken down on the trial. *Bird vs. Meadows*, 281
2. The business of attending to applications for pardons before the Legislature is not restricted to Attorneys at Law. *Id.*

INFERIOR COURT.

Between the time of the adoption of the amendment of the Constitution, abolishing that part of the Constitution which conferred the "powers of a Court of Ordinary" on the Inferior Courts, and transferring these powers to the Ordinary, and the time of the appointment of the Ordinaries under the amendment, the Inferior Court of Marion county, appointed a guardian. *Held*, that the appointment was valid. *Aycock vs. Aden*, - - - - - 694

INJUNCTION.

1. Motion to dissolve an injunction on the coming in of the answer, ought to be refused, unless all the equity set up in the bill is denied by the answer. *Pledger et al. vs. McCauley*, - - - - - 46
2. The answer displacing a part only of the equity of the bill, is not sufficient for a dissolution of an injunction granted in the cause. *Jackson et al. vs. Jones et al.*, - - - - - 93
3. When the equity of an injunction bill has been sworn off by the answer, the injunction may be dissolved. *Alexander vs. Markham*, - - - - - 148

INSOLVENT DEBTORS.

1. A party arrested by *ca. sa.*, and giving bond to take the benefit of the Act of 1823, for the relief of honest debtors, is not subject to be arrested a second time, by the same *ca. sa.*, until the case made by the giving of the bond, has been ended. *Harris vs. Broyles*, - 136
2. The schedule filed by an insolvent debtor, should contain a list of the property which he owned at the time of filling the same, and not the property which he had at the date of his arrest. *Johnson vs. Martin et al.*, - - - - - 268
3. An insolvent debtor, notwithstanding his arrest and imprisonment, may *bona fide* sell or mortgage his property for cash, or to pay or secure a pre-existing debt. *Id.*
4. All fraudulent conveyances or transfers of property, made by an insolvent debtor, to hinder or delay creditors, or in trust for the benefit of himself or his family, before or at the time of his arrest, or subsequently, will prevent him from taking the benefit of the Act. *Id.*
5. If a debtor, at the time of his arrest, or after, or so short a time before as to create a just suspicion respecting the matter, is seen with money or other effects, it is competent for the creditors to prove the fact; and it will be incumbent upon the debtor to account for the same, in order to relieve himself from the inference of fraud, which the transaction suggests. *Id.*

See *Exemption Laws*, 1, 2.

JOINT OWNERS—RIGHT OF SURVIVOR
TO SELL.

Two parties agree that one of them should furnish the materials and the other should make two buggies, and one of the parties should fix the price and then either might sell; the death of one of the parties does not affect the power of the other to sell the buggies.
Jackson vs. Paxon, adm'r, - - - - 36

JUDGMENTS.

1. H. died pending a suit against him; afterwards, an order was passed making his administrator, D, a party in his place—the order reciting, that D. had been served with a *scire facius*. D. moved to set aside this order, alleging that he had not been so served:

Held, That the recital in the order, did not *conclude* him from proving his allegation. *Dozier, adm'r vs. Richardson, Hartsfield & Co.,* - - - - 90

2. A judgment binds only the parties and their privies. Remark as to *Dickerson vs. Powell*, 21 Ga. *Russell vs. Slaton,* - - - - 193

See *Mortgage Lien*, 2.

JUDGMENTS—DORMANT.

An execution is issued in 1841—money is collected on it from the sale of defendant's property in 1846; in 1848, there is a return of *no property*; in 1850 money is raised on a *fi. fa.* in favor of the defendant, and paid over by order of Court to this execution, against him, which is receipted for on the *fi. fa.* by plaintiff's attorneys:

Held, That the execution is not inoperative under the dormant judgment Act of 1822. *Ector vs. Ector,* 374

INDEX.

JUROR.

See *Crim. Law*, 15, 18.

JUSTICE COURTS—JURISDICTION OF

The Act of 1856, enlarging the jurisdiction of Justices' Courts to demands not exceeding fifty dollars, includes demands sued for by *attachment*, as much as demands sued for by ordinary process. *Barrett et al., vs. Black, Cobb & Co.*, 151

LARCENY.

See *Crim. Law*, 1, 2, 20.

LEGITIMATED CHILD.

See *Distribution of Estates*, 3.

LIMITATION OF ACTIONS.

If a trustee collude with a third person, to defraud his *cestui que trust*, the statute of limitations does not begin to run until after the fraud is discovered. *Walker vs. Walker, adm'r.*, 76

See *Adm'rs and Ex'ors*, 3.

See *Gaming*, 1.

LIMITATION OF ESTATES.

See *Wills*, 5.

MAILABLE MATTER.

A contract by the Express Company for the transportation of mailable matter, over the usual mail route be-

tween cities in the United States, unless it be such matter as is excepted from the prohibitions in the Acts of Congress, is void, and the Company has no lien growing out of such contracts. *Hill vs. Mitchell*, 704

MANUMISSION OF SLAVES.

1. A will directing the executor, after the payment of the debts of the testator, which were small, and the estate, independent of the negro property, ample to discharge them, to remove the testator's slaves to some free State, to be selected by the executor, and there to set them free, is not contrary to the laws of this State, nor within the Acts of 1801 and 1818, prohibiting manumission in this State, except by the sanction of the Legislature. BENNING, J. dissenting. *Sanders vs. Ward et al.*, 109

2. F. J. Walker, by the 2d item of his will, directed his executors to send to the Colony in Liberia, in Africa, at the expense of his estate, certain slaves therein named. By the 4th item of the will, the executors were authorized, without any order from any Court, to sell at public or private sale, for cash or on credit, in their discretion, any and all of testator's property, real and personal, and any or all of his slaves, except those specially directed to be colonized, in order to carry out testator's wishes. And by the 5th item of the will, the entire proceeds of the estate is to be invested in such manner as the executors may see fit, and transferred to the American Colonization Society, to be held by them in trust for the maintenance and support of the seven slaves specified and their descendants.

Held, That the trust created by this will in favor of the slaves to be colonized in Africa, was valid; but one which could not be executed by the American Coloni-

zation Society under their charter. *Walker et al, vs. Walker, ex'ors,* - - - - - 420

3. The trust being legal, and the *cestui que trusts* capable of taking, the Chancellor will appoint the executors, or some other fit and proper persons, to carry the trust into effect. *BENNING, J. dissenting. Id.*

MARRIED WOMEN.

1. Calvin B. Churchill conveyed by deed to Benjamin E. Gilstrap and Drury Corker, in trust for his wife, Mary Churchill, certain slaves, to have and to hold said slaves, together with all their future increase, unto his said wife, Mary, her heirs, executors, administrators and assigns forever; the said Calvin B. Churchill reserving to himself the use of the said negroes, during his natural life, free from charge, let, hire or hindrance; the said Calvin B. Churchill to work, use, occupy and enjoy the profits arising from their labor, free from any accountability whatever; but said negroes and their increase subject to any disposition the said Mary Churchill may think proper to make, at or after her death, either by will, deed, or otherwise.
- Held*, 1st. That by this deed, the marital rights of the husband to the property embraced in it were excluded, except as to the enjoyment of the property during his life. Beyond this, the dominion over the property by the husband was extinguished; his power of alienation was gone; so his power of disposition by will; so its inheritable quality from him. 2d. The wife dying first, she had the right to dispose, of her separate property in the slaves by will, which was the remainder after her husband's death. 3d. Had the wife survived the husband, the trust would, *eo instanti*, have become executed by the vesting of the absolute title in her. Had she died first, without having exercised the power

of appointment, the property would have gone to the husband, as her heir at law. As it now stands, it vests in her personal representative. *Churchill et al., vs. Cor-ker, adm'r,* - - - - - 479

2. There is nothing in the words of this will, which would prevent the wife from disposing of this property by will, as she has done. *Id.*

3. The administrator with the will annexed, and not the trustees, are the proper parties to institute suit for the recovery of this property. *Id.*

MARRIAGE SETTLEMENT.

1. Constructive notice of an unrecorded marriage settlement is sufficient to bind a *bona fide* purchaser, a *bona fide* creditor, or a *bona fide* surety, under the Act of 1847 requiring marriage settlements to be recorded. *Cummin vs. Boston & Gunby.* - - - 377

2. Such notice as would excite apprehension in ordinary minds and prompt enquiry, is constructive notice. *Id.*

3. Marriage settlements, when there is any doubt in regard to their construction, must be expounded so as to give effect to the intention of the parties, and the word "issue" is often used as a word of purchase, and must be frequently so interpreted. *Lafitte vs. Lawton.* 305

4. A marriage settlement was entered into between A. B. L., the husband, and M. E. B., the wife, by which the wife's property was conveyed to a trustee upon the fol-

lowing trust, to-wit: 1st. A. B. L. is to be permitted to have, receive, take and enjoy the interest and profits to and for the joint use, benefit and support of the said A. B. L. and M. E. B., the intended wife, and the issue of the marriage (if they should be blessed with any,) during the life of the said A. B. L. 2d. After the death of the said A. B. L., the trustee to hold in trust for and to the use, benefit and support of the said M. E. B. (should she survive him) and the issue of her body by the said contemplated or any future marriage (if she should be blessed with any) during the life of the said M. E. B. 3d. After the death of the said M. E. B., the trustee to hold in trust for and to the use, and support, and benefit of the issue of the body of the said M. E. B. by the said contemplated or any future marriage, if she should be blessed with any. M. E. B. died in the lifetime of A. B. L. There were issue of the marriage. *Held*, That the issue of the marriage took the whole of the estate subject to the interest of A. B. L. as expressed in the settlement. *Id.*

MARSHALLING SECURITIES, &c.

See *Bond for Titles*, 1, 2.

MORTGAGES.

1. The purchaser at Sheriff's sale, of property subject to a mortgage with notice of the mortgage, cannot occupy a more favorable position in relation to the property than the mortgagor. *Johanson vs. Crawley*. - 316

2. When the mortgagor against whom a rule is taken, to foreclose a mortgage, makes no resistance, it is not competent for a third person to interpose objections; neither will the Court itself of its motion do so. *Sutton vs. Sutton*. - - - - - 323

3. A discrepancy between the debt and the mortgage given to secure it, may be explained by parol proof; and the creditor will not be driven into equity for that purpose. *Id.*

See *Corporations*, 3.

See *Presumptions*, 2.

MORTGAGE LIEN.

1. The owner of a city lot mortgages it in 1855; in September, 1856, a tax execution is issued to collect the tax due by the mortgagor, for 1856, and sells, not the equity of redemption, but the whole property, a property worth six or seven thousand dollars, for less than one hundred.

Held, That the lien of the mortgage is not divested by the sale. *Doane vs. Crittenden & Co.* - - - 103

2. A made a mortgage to B. which was not recorded until after the three months had elapsed. Before foreclosure, C. obtained a general judgment against A., the *fi. fa.* from which was levied on the mortgaged property. At the sale under this levy, notice of the mortgage was given to the purchaser.

Held, That as the judgment creditor, had gained a priority over the mortgagee, the purchaser purchased free from the encumbrance of the mortgage, notwithstanding the notice. *Smith vs. Jordan.* - - - 687

NE EXEAT.

1. To entitle securities, upon a bail bond in trover, to the writ of *ne exeat* against the administratrix of their principal, it is not sufficient to allege, merely, that she is insolvent, and that complainants are informed, and believe, that the negroes in dispute will be removed beyond the limits of the State, and leave them bound for

their production, in the event of a recovery. *Woods vs. Symmes.* - - - - - 69

2. To entitle a party to the process authorized by the Act of 1830, to authorize the issuing of writs of *ne exeat* &c., the affidavit of the party applying, required by the statute, must be positive. *Holliday vs. Riodan.* - 699

NEW TRIAL.

1. Where the evidence is balanced, a judgment refusing a new trial, will not be disturbed. *Pearce vs. Vaughn,* - - - - - 27

2. Where there is a conflict of testimony, and a portion being disregarded, for want of credibility in the witnesses, it being apparent that they were incapable from nonage to understand the facts about which they testify, and the balance preponderates in favor of the verdict, it is not error in the Court to refuse to grant a new trial, on the ground that the verdict was contrary to the evidence. *Walker vs. Walker, adm'r. &c.,* - 78

3. If no objection is made to the admission of illegal evidence, its admission will not be ground for a new trial. *Brown & Bowen vs. Robinson,* - - - 141

4. Upon a motion for a new trial, it is a sufficient compliance with the rule of Court requiring a brief of the testimony to be filed under the approval of the Court, if the same has been substantially agreed upon by the counsel. *Hamilton vs. Conyers,* - - - 153

5. A motion for new trial may be amended, so as to perfect a brief of the testimony began, but not formally finished, at the time the application was filed; the counsel for movant agreeing to adopt the written state-

ment of the evidence taken down at the time, by the opposite counsel.

The motion for a new trial is amendable.—*BENNING J. Id.*

6. A new trial will not be granted on the ground of newly discovered evidence; merely to give the party an opportunity to impeach the credit, much less to prove a mistake as to dates, in the testimony of a witness sworn on the trial. *Mitchell vs. Printup,* - 182

7. Whenever the question is one of evidence only, and there is room for apprehension that the jury, on account of the ambiguity in the language of the charge, may have been misled in considering and weighing the testimony, it is safest to send the case back for another trial. *Fain vs. Cornell, adm'r.,* - - 184

8. When the question is one of fact purely—the soundness or unsoundness of the property at the time of sale—and the case has been fairly submitted to the jury, their verdict will not be disturbed. *Hopkins vs. Tillman,* - - - 212

9. If verdict be decidedly against the weight of evidence, new trial should be granted. *Parker vs. Johnson, adm'r.,* - - - 576

NON-SUIT.

See *Bills of Exchange and Promissory Notes*, 5.

See *Practice Superior Court*, 10.

ORDINARY.

An Ordinary has no jurisdiction to appoint a guar-

dian for an infant whose residence is out of his country. *Rives, guardian, vs. Sneed,* - - - 612

See *Inferior Court.*

See *Guardian and Ward*, 3.

PARENT AND CHILD.

A father is bound to support and educate his children, if he is able to do so, even although they may have property of their own. *Hines and Bryan vs. Mullins, ordinary, &c.,* - - - 696

PARENT—CUSTODY OF CHILD.

The adopted father of a child is as much entitled to the custody of his person as his actual parent. *Rives, guardian, vs. Sneed,* - - - 612

PARTIES.

See *Appeals*, 5.

See *Equity, Pl. and Pr.*, 4, 5.

See *Married Women*, 1, 2, 3.

PARTNERSHIP.

1. A. gives two promissory notes to B.; B. sues A. and C. as partners; C. pleads under oath that at the time said notes were given, he was not the partner of A.
Held, That this plea put upon B. the necessity of showing by proof that A. had authority to bind C. *Strawes vs. Waldo, Barry & Co.,* - - - 641

2. After the dissolution of a partnership, one partner cannot bind another by a new contract. *Bower vs. Douglass, adm'r.* - - - 714

**PASSENGERS ON RAILROADS—THEIR
BAGGAGE—MONEY, &c.**

1. A passenger for his fare, has a right to have his baggage carried; by which is meant the ordinary wearing apparel customarily carried by travelers, and such other articles as may be needed for his comfort or amusement. *Hutchins & Co. vs. Western and Atlantic Railroad*, - - - - - 61
2. Money, except for the payment of expenses, and merchandise, not included in the term baggage. *Id.*
3. Travelers bound to pay customary and reasonable freight for the transportation of money. *Id.*
4. A person transporting money over a railroad, upon which freight is demandable, cannot defeat the right to exact the freight and recover it, by a fraudulent concealment of it. *Id.*
5. Whatever is carried into the passenger car of railroad as baggage, is so far considered in the possession of the conductor or agent of the road, as to authorize him to exercise the right of retainer for dues for passage or freight on the article itself. *Id.*

PLEADINGS.

1. It is a good defence in an action for the price of work done under a special contract, that the work was unfaithfully done, whether there was an express warranty or not. *Doster vs. Brown*, - - - - - 24
2. A declaration alleging that the defendants received 40 bales of cotton, to be delivered to R. & C., at Charles-

ton, South Carolina, is not supported by proof that it was to be delivered to the Agent of the South Carolina Railroad, at Augusta. *Rome Railroad Co. vs. Sullivan, Cabot & Co.* - - - - - 228

3. A recovery in an action of covenant for a breach of warranty of the soundness of a slave, may be pleaded in bar of a second action for a false warranty of soundness of the same slave, on the same sale. *Mitchell vs. Gillespie,* - - - - - 346

4. If the city authorities remove its Marshal for a *specified* cause, and it be determined that such cause did not warrant the removal, and the Marshal sue for his salary and fees, the city authorities may aver and prove other matters good in law to justify the removal. *The Mayor &c. of Macon vs. Hays, adm'r,* - - - 590

5. A plea by one of two persons sued as partners, that he did not sign the note sued on, or authorize any other person to sign it for him, and that he was not one of the partners, when the debt was contracted, is not a plea in abatement, but a plea in bar. *Holman vs. Carhart, Bro's & Co.,* - - - - - 608

6. To sustain a motion to dismiss, made by way of demurrer to the declaration, the motion will not be allowed, unless every material fact on which the motion is founded, is apparent in the declaration. *Bower vs. Douglass, adm'r,* - - - - - 714

See *Guardian and Ward*, 1, 2. *Amendment* 2.

See *Set-off*.

POOR CHILDREN.

See *Wills*, 2.

POSSESSION OF PERSONAL PROPERTY.

Possession of property is *prima facie* evidence of title; and where the possession is joint, the presumption is in favor of the party who exercises principally, if not exclusively, acts of individual control and dominion over the property. *Reid vs. Butt, adm'r*, - - 28

PRACTICE IN SUPERIOR COURT.

1. It is not error for the Court to arrest the argument of counsel on a point to which there is no evidence. *Doster vs. Brown*, - - - - 24
2. On the trial of a case, when the evidence had closed, the Court "directed counsel for the plaintiff, to go on and state his points relied on for a recovery, to the jury. Plaintiff's counsel did so. Defendant's counsel then asked the Court, to give the law in charge to the jury; whereupon, counsel for the plaintiff, insisted that he had a right to argue his case to the jury." The Court refused to allow him to do so. *Held*, That the Court erred. *Cartwright vs. Clopton*, 85
3. A jury is bound to consider, even illegal testimony, if it goes before them, without objection. *Thomas vs. Ellis*, - - - - 137
4. If counsel have leave of absence, it dispenses with the discharge of any and every professional duty imposed upon them by the business of the Court at that Term. *Hamilton vs. Conyers*, - - - 158

5. The Court is not bound to grant a motion, made in the midst of the trial, to require the Sheriff to execute a deed in pursuance of a sale by a former Sheriff, that took place more than twenty years before; and took place under a *fi. fa.* entered satisfied, "all but 18½ cents;" the "all but 18½ cents" being, by interlineation, and in a different ink. *Russell vs. Slaton*, 193
6. Counsel have no right to argue before the jury points to which there is no evidence. *Dickerson vs. Burke*, 225
7. On an issue of fraud, tendered by the creditors, to an application by a debtor, to take the benefit of the Act passed for the relief of honest debtors, counsel for the creditors are entitled to open and conclude the argument. *Johnson, vs. Martin et al.*, - - 268
8. In a case in the last resort, when the witness is in Court, and counsel on each side are to be heard on the evidence, his testimony ought to be received, notwithstanding the case may have been partially argued before the jury, the opposite party not being surprised by its reception. *Parker vs. Johnston, adm'r*, - - 576
9. If a party acknowledge service, at the appearance Term of the Court, of the process and complaint, he shall not be allowed to dismiss the cause for want of service at the trial Term. *Laramore et al., vs. Chastain*, 592
10. It is almost a matter of course, to let in new evidence on a point, to save a nonsuit. *McColgan vs. McKay*, 631
11. Too late to object to process after party has appeared, confessed judgment, and entered an appeal. *Irwin vs. McKee*, - - - - 648.

12. Surety to appeal bond, against whom the plaintiff failed to enter judgment at the Term when the verdict was obtained may oppose a motion, at a subsequent Term, to enter judgment against him by any evidence which will establish fraud in the verdict against him, and he is not compelled to make affidavit of the truth of the facts on which he relies. *Dennard & Kearsey vs. Mayo*, - - - - - 681

PRACTICE IN SUPREME COURT.

1. When a question of fact, is by agreement referred to the Court, and there is evidence on both sides of the question, the decision, be it which way it may, will not be reversed by the Supreme Court. *Sullivan vs. Richardson & Ketchum*. - - - - - 154
2. If defendant in error relies, as a defence, upon a release of the errors assigned in the record, he must plead it. *Bigby vs. Powell, adm'r*. - - - - - 244
3. If a party be entrapped, by misrepresentations, to join issue on assignment of error, he ought, as soon as he discovers it, show it to the Court and move to withdraw his joinder. *Id.*
4. This Court will not interfere with the order of business, unless it appears that the presiding Judge exercised discretion in that respect illegally. *Larumore vs. Chastian*. - - - - - 592
5. After the Superior Court has passed an order under the Act of 1856, making a child the adopted child of a person not his parent, if the same Court have the power to rescind the order, it is a matter of discretion with it which this Court cannot control. *Rives, guardian, vs. Sneed*. - - - - - 612

PRESUMPTIONS.

1. Where an unmarried son lives with his father, the presumption is that the property on the place belongs to the father. If the father lives with the son, the presumption is the other way. *Reid vs. Butt, adm'r.*

2. L. gives a mortgage to secure H. & H. for certain funds advanced by them for him, before that time, as well as to indemnify and save them harmless for any advances, acceptances, or endorsements, made thereafter by the mortgagees for and on account of the mortgagor:

Held, That upon the production by mortgagees of drafts and acceptances, corresponding to the description of indebtedness, specified in the instrument, that the presumption was, that they had been paid by the holders out of their own funds, and upon the credit of the mortgage, and not out of the funds of the drawers. *Lewis vs. Wayne, adm'r.*

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3. R. petitioned the City Council of Augusta to build two new stalls at a Market House, stating that he would rent one of them at \$300 a year. The Council adopted a motion granting the request. At the next meeting, this motion was reconsidered. It did not appear, but that there was a standing rule making the action of one meeting subject to be reconsidered by the next meeting.

Held, That the jury were at liberty to presume that there was such a rule and if such a rule existed, the Council was not concluded by its first action, but might reverse that action. *Red vs. The City Council of Augusta.*

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PROCESS—WAIVER OF.

An endorser sued in the same suit with the maker of a promissory note, and residing in a different county, may waive the issuing of a second original and process, and his waiver will bind him. *Humphries vs. McWhorter & Brightwell* - - - - - 37

PURCHASER—NOTICE TO.

Notice to a purchaser, that a particular person claims title to the thing about to be purchased, is sufficient, notwithstanding that the notice may not give the nature of the claim. *Poulet and Wife, vs. Johnson, et al.* 403

RAILROADS.

1. The Rome Railroad Company has a right, under the powers granted in its charter, to contract to deliver produce at a point which can be reached only by passing it over connecting roads. *Rome Railroad Co. vs. Sullivan, Cabot & Co.* 228
2. It cannot, however, bind the companies owning the connecting roads, without their consent or acquiescence. *Id.*
3. If there be no special contract, a railroad company is not bound to carry freight beyond the terminus of its road; but if it be directed to a place beyond, it is bound to deliver it over to the proper custody, to ensure its due transportation. *Id.*

REGISTRATION OF DEEDS.

1. A subsequent purchaser of land having actual notice of a prior unrecorded deed for the same land, is

not protected against the claim of the grantee in such prior deed. *Burkhalter vs. Ector*, - - - 55

2. A deed made in 1822, and recorded May, 1836, will take precedence of a deed made and recorded December, 1837. *Hand & Cook, lessors, vs. McKinney*, 648

3. A. sells and conveys a tract of land to B. in 1827. The grant does not issue till 1831. The deed is recorded May, 1836.

Held, that this deed will hold against a Sheriff's deed to the same property, made and recorded in December, 1837. And that the purchase money having been paid by B., he has something more than a complete equitable title; and that under the statute of uses, he has a complete title, both for the purposes of prosecution and defence. *Id.*

SCIRE FACIAS.

See *Judgments*, 1.

SENDING MONEY BY MAIL.

The delivery of a letter with money to the messenger who carries mail bags to the Post Office from the cars and back, without proof that he delivered the letter at the Office, is no evidence that the money was sent by mail. *Davis, Kolb & Fanning vs. Allen*, - - - 234

SEPARATE ESTATE OF WIFE.

Though a limitation over in a will is void as against the statute prohibiting entails, yet a provision that the property shall be in a trustee for the sole use and benefit of the daughter and her bodily heirs, and prohibiting its sale for any other cause and purposes, is good and effectual as to the separate estate created thereby for the daughter, and the husband cannot dispose of it. *Carroll vs. Carroll*, - - - - - 240.

SET-OFF.

If a note be given for a balance on an account stated, the account thus settled cannot be pleaded as a set-off. The proper defence is one which makes an issue upon the settlement. *Bower vs. Douglass, adm'r.*, - 714

SHERIFFS—AND RULE AGAINST.

1. Bail process is placed in the hands of the Sheriff to execute and return; he arrests the defendant but discharges him without taking bond for his appearance to answer the debt of the plaintiff; he takes an obligation from the friend of the defendant to indemnify and save him harmless in the event of a recovery by the plaintiff, the defendant depositing with that friend the amount of the plaintiff's demand. Plaintiff obtains judgment, and a return of *no property* is made upon the execution.

Held, that the Sheriff is liable to be ruled for the money. *DeLongchamp vs. Hicks & Co.*, - - - 200

A Sheriff arrested a defendant in *ca. sa.*, and took from him a defective bond under the honest debtors' Act of 1823, and let him go at large. In doing this, the Sheriff acted in good faith, and under legal advice. Afterwards, the Sheriff re-arrested the defendant, and took another and a perfect bond, under the Act aforesaid; and this he did, time enough to make the bond, &c., returnable to the same Term, to which the first bond, &c., were properly returnable.

Held, that the Sheriff was not liable to a rule for the money due on the *ca. sa.* *Rogers, Sheriff, vs. May*, 463

A Sheriff has no authority to collect money from a defendant who is sued until he is commanded by an execution to levy it on his property. *Irwin vs. McKee*, 646

SHERIFF SALE.

See Equity, 1.

SLANDER.

Words not actionable of themselves may be made so by averment and proof of a colloquium and innuendoes. *Stancell vs. Pryor*, - - - 40

SLAVES.

See Certiorari, 2.

See Criminal Law, 8, 9, 12.

See Manumission of Slaves.

STABBING.

See Criminal Law, 11.

STARK, HON. JAMES H.

Proceedings on the death of, - - - 287

STATUTES, CONSTRUCTION OF, &c.

The title of an Act amending a former Act of the Legislature may be looked to, as well as that of the original Act, to ascertain if the amending Act has any matter different from what is expressed in the title. *Jones vs. the Mayor and Council of Columbus*, - 610

TAX EXECUTION.

Where two tenements on the same lot, worth each several thousand dollars, are both levied on and sold together to satisfy a tax execution of less than one hundred dollars, the sale is absolutely null and void. *Doane vs. Crittenden & Co.*, - - - 103

See Mortgage Lien, 1.

TAXES BY MUNICIPAL CORPORATIONS.

1. A city having the right to tax slaves employed and laboring in the city, belonging to persons resident out of the city, may discriminate in the amount of tax imposed on them respectively. *Jones vs. the City Council of Columbus*, - - - - 610
2. The Mayor and Council of the city of Columbus have no power to impose a tax on real estate within the city, to pay the city bonds issued to build the Mobile and Girard Railroad, there being no Act of the Legislature authorizing it. *Id.*

TROVER.

1. If one, by his will, undertakes to dispose of property claimed by another, and in his possession, the will is no evidence of claim until its publication; no knowledge of its contents being brought home to the opposite party. Neither can the inventory and appraisement of such property, by the executor, be given in evidence in support of his testator's title; suit having been brought within five years from the death of the testator. *Walker, vs. Walker adm'r.* - - - - 76
2. If, in trover and bail under the Act of 1821, the defendant proves unable to give the bond, and the plaintiff gives it, and receives possession of the negroes, and then dismisses his action, and fails to restore the negroes to the defendant, such dismissal and failure amount to a breach of his bond.—BENNING J. *Freeman vs., Norwell.* - - - - 359

See *Adm'rs and Ex'ors*, 1, 2.

See *Damages*, 2.

TRUSTS AND TRUSTEES.

1. A Trustee is not liable out of his own estate, on a note given by him "as trustee," and so expressed when the consideration of the note enured exclusively to the *cestui que trust*. *Printup, trustee, vs. Trammel*. 240
2. Before the Act of 1856, trust property could be subjected to the payment of trust debts, through a Court of Equity only. *Id.*
- See *Adm'rs. and Ex'ors*. 6.

VENDOR.

See *Bond for Titles*, 2.

VERDICT.

A verdict is not to be set aside on the ground that it was obtained by perjured evidence, unless it appear to the Court, that the verdict could not have been obtained without that evidence. *Richardson vs. Roberts*. 671

See *Crim. Law*, 14.

VOLUNTARY CONVEYANCE.

A person though in debt, may in good faith make a voluntary conveyance of a part of his property, if the part which he retains, is amply sufficient to pay his debts. *Weed vs. Davis* - - - - - 684

See *Fraudulent Conveyances*.

WARRANTY.

See *Charge of the Court*, 1.

See *Evidence*, 13.

See *Pleadings*, 3.

WIDOWS AND ORPHANS—SUPPORT FOR

The Act of 1856, *Pamphlet* 148, pointing out the mode of ascertaining the relief and support to which widows and orphans are entitled out of the estate of their deceased husbands and parents, &c., does not supersede or repeal the Act of 1850, *Cobb* 297, allowing one hundred dollars worth of a deceased insolvent's effects, for the welfare and comfort of his family. *Bonds vs. Allen, Justice.* - - - - - 343

WILLS.

1. A bequest in these words: "I reserve the tract of land, &c., for the use of J. A. W., during his natural life, or so much thereof as he can cultivate for his support, and at his death the same to revert back to my estate; but said land shall not be liable for the debts or contracts of the said J. A. W.," is not void for uncertainty. *Beall vs. Drane et al, ex'ors,* - - - 430

2. The 25th item of the will of Thomas E. Beall was in these words: "It is my will and desire that after my estate shall have been settled up, and all bequests paid out agreeable to the provisions of this my will, the balance of the money or cash remaining in the hands of my executors, shall be invested in an education fund, for the purpose of educating *poor orphan children*, citizens of the county of Columbia, and if the fund should not be absorbed, then the overplus to be applied to the education of the *poor children* of the county of Columbia."

Held, That the bequest was void, on account of the uncertainty as to the persons who were to take under it. The *poor children* of a county, or congregation, or school, are not susceptible of ascertainment. *Id.*

3. Where a power is given by deed, the Ordinary will grant probate of the will of a married woman, without consent of her husband; and were it otherwise, the assent and acquiescence of the husband will be presumed, after the lapse of many years, the husband never having contested its validity. *Churchill et al. vs. Corker, adm'r*, - - - - - 479

4. A father's will contained these words: "All the property hereby given to my daughters, is given to their sole and separate use, not subject to the debts or contracts of their husbands."
Held, That these words restricted the power of alienation in a daughter, so far as to prevent her from mortgaging the property, to secure a note of hers, given for a debt of her husband's. *Keaton vs. Scott*, - - - 652

5. A will containing a limitation over after a failure of issue, made before the passing of the Act of 1854, prescribing a rule for the interpretation of such words, but the testator dying after the passing of the Act, shall be interpreted as directed by that Act. *Worrill, ex'or, vs. Wright, adm'r*. - - - 657

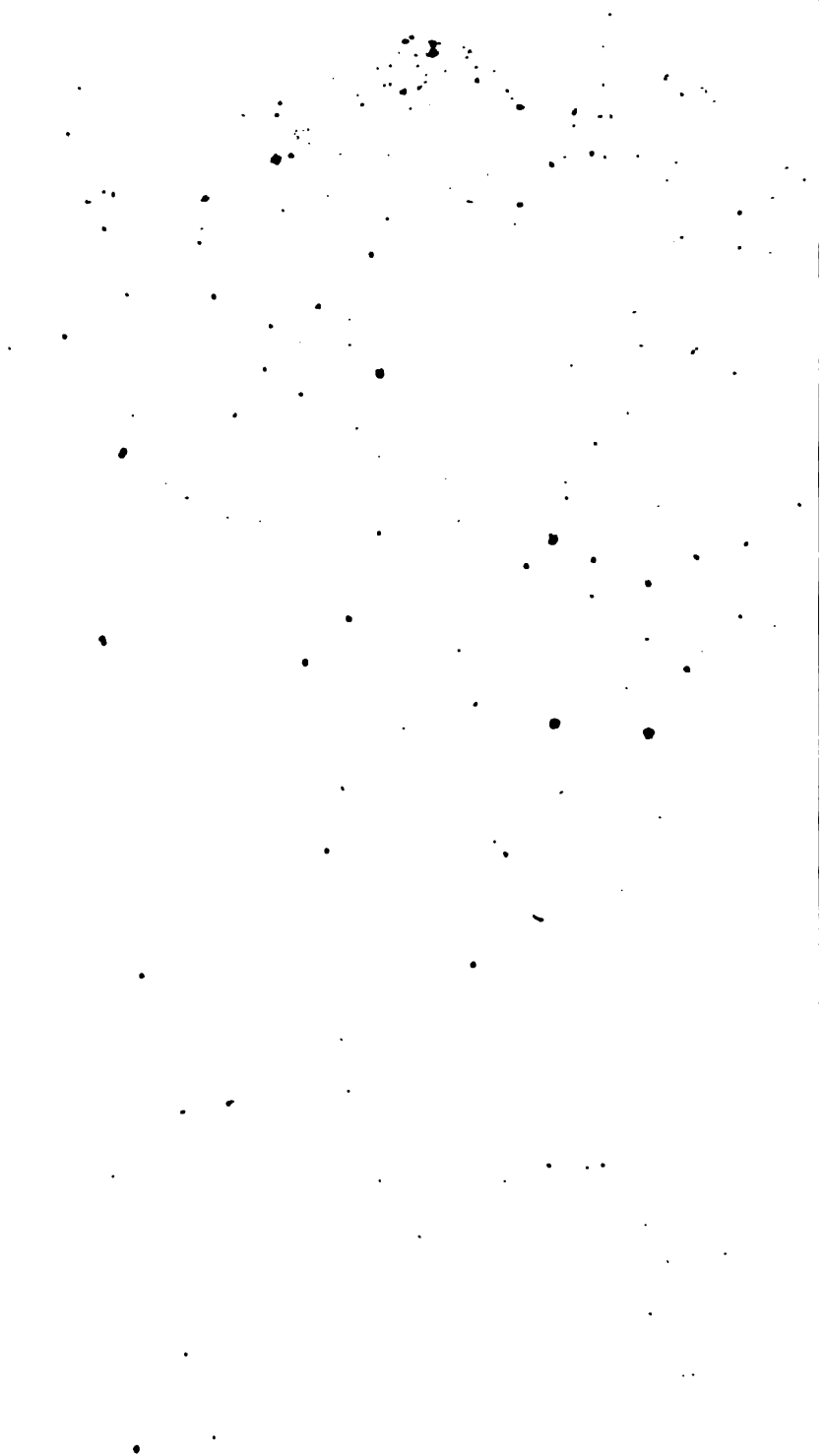
See *Distribution of estates*.

See *Trover*, 1.

WRITS OF ERROR.

A writ of error does not lie to this Court, in a criminal case at the instance of the State. *The State vs. Lavinia, et al.*, (slaves,) - - - 311







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